PROCEEDINGS AND ORDERS DATE: [01/28/92]

CASE NBR: [91105952] CSY STATUS: [DECIDED]
SHORT TITLE: [Hunt, Wayne]
VERSUS [New York] DATE DOCKETED: [093091]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Sep 30 1991	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Oct 11 1991		Brief of respondent New York in opposition filed.
4	Oct 17 1991		DISTRIBUTED. November 1, 1991
6	Nov 4 1991		REDISTRIBUTED. November 8, 1991
8	Nov 12 1991		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

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EDITOR'S NOTE

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ORIGINAL

Number 91-5952

UNITED STATES SUPREME COURT 1991-1992 TERM

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

WAYNE HUNT,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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Petitioner
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QUESTIONS PRESENTED

Whether the double jeopardy clause of the fifth amendment to the United States Constitution is violated by holding a second trial-like, non-capital sentence enhancement proceeding after a failure of proof at a prior identical type of sentence enhancement proceeding.

The New York State Court of Appeals held that it is not.

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162 AD2d 782, 557 NYS2d 694 (3rd Dept., 1990)

148 AD2d 836, 539 NYS2d 109 (3rd Dept., 1989)

JURISDICTIONAL BASIS

Petitioner seeks review of the judgment of the New York State Court of Appeals, dated July 1, 1991 (___ NY2d ___, ___ NYS2d ___), which affirmed the order of the Appellate Division of the Third Department of the New York State Supreme Court, entered June 14, 1990 (162 AD2d 182, 557 NYS2d 694 (3d Dept., 1990)). The Appellate Division order, in turn, affirmed the sentence imposed on petitioner in the County Court of the County of Rensselaer and the State of New York on August 30, 1989. (148 AD2d 836, 539 NYS2d 109 (3d Dept., 1989))

The Supreme Court has jurisdiction to grant a writ of certiorari herein pursuant to 28 USC §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. United States Constitution, Fifth Amendment, Double Jeopardy Clause:

> "[N]or shall any person for the same offense be twice put in jeopardy of life or limb... ."

2. N.Y. Crim. Proc. Law §400.21 (McKinney 1983):

> Procedure for determining whether defendant is a second felony offender.
>
> 1. Applicability. The provisions of this section govern the procedure that must be followed in any case where it appears that a defendant who stands convicted of a felony has previously been convicted of a predicate felony and may be a second felony offender as defined in section 70.06 of the penal law.

2. Statement to be filed. When information available to the court or to the people prior to sentencing for a felony indicates that the defendant may have previously been subjected to a predicate felony conviction, a statement must be filed by the prosecutor before sentence is imposed setting forth the date and place of each alleged predicate felony conviction. Where the provisions of subparagraph (v) of paragraph (b) of subdivision one of section 70.06 of the penal law apply, such statement also shall set forth the date of commencement and the date of termination as well as the place of imprisonment for each period of incarceration to be used for tolling of the ten year limitation set forth in subparagraph (iv) of paragraph (b) of such subdivision.

3. Preliminary examination. The defendant must be given a copy of such statement and the court must ask him whether he wishes to controvert any allegation made therein. If the defendant wishes to controvert any allegation in the statement, he must specify the particular allegation or allegations he wishes to controvert. Uncontroverted allegations in the statement shall be deemed to have been admitted by the defendant.

4. Cases where further hearing is not required. Where the uncontroverted allegations in the statement are sufficient to support a finding that the defendant has been subjected to a predicate felony conviction the court must enter such finding and when imposing sentence must sentence the defendant in accordance with the provision of section 70.06 of the penal law.

5. Cases where further hearing is required. Where the defendant controverts an allegation in the statement and the uncontroverted allegations in such statement are not sufficient to support a finding that the defendant has been subjected to a predicate felony conviction the court must proceed to hold a hearing.

6. Time for hearing. In any case where a copy of the statement was not received by

the defendant at least two days prior to the preliminary examination, the court must upon request of the defendant grant an adjournment of at least two days before proceeding with the hearing.

7. Manner of conducting hearing.

(a) A hearing pursuant to this section must be before the court without jury. The burden of proof is upon the people and a finding that the defendant has been subjected to a predicate felony conviction must be based upon proof beyond a reasonable doubt by evidence admissible under the rules applicable to a trial of the issue of guilt.

(b) A previous conviction in this or any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected to a predicate felony conviction. The defendant may, at any time during the course of the hearing hereunder controvert an allegation with respect to such conviction in the statement on the grounds that the conviction was unconstitutionally obtained. Failure to challenge the previous conviction in the manner provided herein constitutes a waiver on the part of the defendant of any allegation of unconstitutionality unless good cause be shown for such failure to make timely challenge.

(c) At the conclusion of the hearing the court must make a finding as to whether or not the defendant has been subjected to a predicate felony conviction.

8. Subsequent use of predicate felony conviction finding. Where a finding has been entered pursuant to this section, such finding shall be binding upon that defendant in any future proceeding in which the issue may arise.

3. New York State Penal Law §70.06 (McKinney 1987):

1. Definition of second felony offender.

(a) A second felony offender is a person, other than a second violent felony offender as defined in section 70.04, who stands convicted of a felony defined in this chapter, other than a class A-I felony, after having previously been subjected to one or more predicate felony convictions as defined in paragraph (b) of this subdivision.

(b) For the purpose of determining whether a prior conviction is a predicate felony conviction the following criteria shall apply:

(i) The conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed;

(ii) Sentence upon such prior conviction must have been imposed before commission of the present felony;

(iii) Suspended sentence, suspended execution of sentence, a sentence of probation, a sentence of conditional discharge or of unconditional discharge, and a sentence of certification to the care and custody of the division of substance abuse services, shall be deemed to be a sentence;

(iv) Except as provided in subparagraph (v) of this paragraph, sentence must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted;

(v) In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period of periods equal to the time served under such incarceration;

(vi) An offense for which the defendant has been pardoned on the ground of innocence shall not be deemed a predicate felony conviction.

2. Authorized sentence. Except as provided in subdivision five of this section, when the court has found, pursuant to the provisions of the criminal procedure law, that a person is a second felony offender the court must impose an indeterminate sentence of imprisonment. The maximum term of such sentence must be in accordance with the provisions of subdivision three of this section and the minimum period of imprisonment under such sentence must be in accordance with subdivision four of this section.

3. Maximum term of sentence. Except as provided in subdivision five of this section, the maximum term of an indeterminate sentence for a second felony offender must be fixed by the court as follows:

(a) For a class A-II felony, the term must be life imprisonment;

(b) For a class B felony, the term must be at least nine years and must not exceed twenty-five years;

(c) For a class C felony, the term must be at least six years and must not exceed fifteen years;

(d) For a class D felony, the term must be at least four years and must not exceed seven years; and

(e) For a class E felony, the term must be at least three years and must not exceed four years.

4. Minimum period of imprisonment. (a) The minimum period of imprisonment for a second felony offender convicted of a class A-II felony must be fixed by the court at no less than six years and not to exceed twelve and one-half years and must be specified in the sentence.

(b) Except as provided in paragraph (a), the minimum period of imprisonment under an indeterminate sentence for a second felony offender must be fixed by the court at one-half of the maximum term imposed and must be specified in the sentence.

5. Lifetime probation. Notwithstanding any other provision of law the court may sentence a person convicted of a class A-II felony or a class B felony defined in article two hundred twenty of this chapter to lifetime probation in accordance with the provisions of section 65.00.

STATEMENT OF CASE

On November 24, 1987, petitioner Wayne Hunt was sentenced in Rensselaer County Court (hereinafter "County Court") as a "second felony offender", a term defined by N.Y. Penal Law §70.06. (A-191-193; 223) On October 15, 1987, petitioner had pleaded guilty in County Court to eighteen counts of a fifty-count indictment. (A-113-118) At the ensuing sentencing hearing, the People presented County Court with a statement pursuant to N.Y. Crim. Proc. Law §400.21 (McKinney 1983) (hereinafter, "CPL §400.21 Statement") alleging that petitioner was the subject of a specific prior conviction, and was, therefore, a "second felony offender" as defined by N.Y. Penal Law §70.06 (McKinney 1987). (A-221) By statute (N.Y. Penal Law §70.06 (McKinney 1987)), the sentence of one adjudicated a second felony offender was required to be enhanced - i.e., a defendant found to be a second felony offender was required to be given a lengthier term of imprisonment than one who had been convicted of the same offense but who was not a second felony offender. Petitioner was sentenced as a second felony offender. (A-214-218)

On appeal, the Appellate Division of the Supreme Court, Third Department (hereinafter "Appellate Division"), held that the conviction alleged in the People's CPL §400.21 statement did not meet the statutory requirements for a prior felony which would make petitioner a second felony offender. Accordingly, petitioner's sentence was vacated, and petitioner was remanded to County Court for resentencing "as a first felony offender". (A-6)

Subsequently, the People moved the Appellate Division for leave to reargue. That court, granting the People's motion, modified its prior decision by deleting the aforesaid language requiring petitioner to be sentenced as a first felony offender. (A-7)

Before resentencing, petitioner submitted to County Court a motion for an order precluding the holding of another second felony offender proceeding, on the ground that such a proceeding would violate the respective double jeopardy clauses of the New York State Constitution and the United States Constitution. (A-121-124; 144-160) Petitioner reiterated this motion at the resentencing hearing of August 30, 1989. (A-169-171) County Court denied petitioner's motion. (A-180-181; 191)

Accordingly, a second second felony offender proceeding was held. At it, the People again submitted a CPL §400.21 Statement. (A-136; 167-168) This alleged that petitioner was the subject of a predicate felony conviction other than the one the People had adduced at the first second felony offender proceeding. Specifically, the prior felony conviction, dating from 1977, was entered in the United States District Court of the Western District of Louisiana. Further, the People offered a certified copy of this judgment of conviction. (A-169; 210-211) Concluding that the People's proof established that the petitioner was a second felony offender, County Court sentenced petitioner as such. (A-191-194)

On appeal to the Appellate Division, petitioner again contended that subjecting him to the second second felony offender

hearing violated the double jeopardy clause. Citing People v. Sailor, 65 NY2d 224 (1985), the Appellate Division rejected petitioner's contention, and affirmed the judgment of conviction. (A-6-7)

On July 1, 1991, the New York State Court of Appeals affirmed the order of the Appellate Division on the basis of the lower court's opinion. One justice of the Court of Appeals dissented, on the ground that the double jeopardy clause forbid the second sentence enhancement proceeding. (A-1-3)

REASONS FOR ALLOWING THE WRIT

This case squarely presents an issue which has divided both state and federal courts and which this Court has expressly left open (Lockhart v. Nelson, 488 US 33, 37-38 n.6 (1988), 102 LEd2d 265, 271-272, 109 S Ct 285,289): whether the double jeopardy clause is applicable to trial-like, non-capital sentence enhancement proceedings.

In the state-court proceedings herein, petitioner was subjected to two sentence enhancement proceedings of the very same type, the purpose of which was to ascertain whether he was a "second felony offender" within the meaning of N.Y. Penal Law §70.06 (McKinney 1987). If petitioner were found to be a second felony offender, then, by statute, he was required to be sentenced to a lengthier term of imprisonment than he would be sentenced to were he not a second felony offender. N.Y. Penal Law §70.06 subds. (2)-(4) (McKinney 1987). At the first such hearing, the People offered evidence which, as a matter of law, was insufficient to prove petitioner a second felony offender. (A-5-6; 221) At the second second felony offender proceeding, however, the People offered legally sufficient evidence; accordingly, petitioner was found to be and was sentenced as a second felony offender. (A-136; 167-169; 191-194) Before it commenced, petitioner objected to this repeated second felony offender proceeding on the ground that, under Bullington v. Missouri, 451 US 430 (1981), his subjection to it violated the double jeopardy clause of the New

York State Constitution and the United States Constitution. (A-121-124; 144-160; 169-171) This argument was rejected by the sentencing court as well as the Appellate Division and the New York Court of Appeals, apparently on the ground that Bullington's application is limited to capital sentencing proceedings. (A-1-2; 8-9; 180-181; 191)

Bullington v. Missouri, supra, involved a capital murder trial's sentencing phase, at which the state had the burden of proving certain aggravating factors beyond a reasonable doubt, and the sentencer, a jury, had to choose between imposition of death and life in prison. At a first such hearing, the jury imposed life in prison, rather than death. Thereafter, however, the defendant obtained a retrial; again he was convicted of capital murder, and the state sought to subject him to a second sentencing hearing, at which he again would run the risk of death. Id at 435-437. The Supreme Court held that this second sentencing proceeding would violate the double jeopardy clause of the fifth amendment. "Having received 'one fair opportunity to offer whatever proof it could assemble', Burks v. United States, 437 US 1, 16, 57 LEd2d 1, 987 S Ct 2141", the Court concluded, "the State is not entitled to another." 451 US at 446.

Bullington left unclear the scope of its holding: is the double jeopardy clause applicable to trial-like sentence enhancement proceedings regardless of the severity of the punishments in issue, or only if one of those punishments is death?

That it dealt only with a sentence enhancement proceeding in which capital punishment was in issue supports the view that Bullington merely makes the double jeopardy clause applicable to trial-like capital sentencing proceedings.

That the reasoning in Bullington relied mainly on the trial-like nature of the procedure in issue, however, supports the contrary view. Thus, for example, in summarizing its conclusion in Bullington, this Court wrote that "[b]ecause the sentencing proceeding at petitioner's first trial was like the trial on the issue of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury is also available to him, with respect to the death penalty, at his retrial." 491 US 430, 446.

Not surprisingly, the courts are divided as to whether the double jeopardy clause applies to all trial-like sentence enhancement proceedings or, rather, to only those trial-like sentence enhancement proceedings which, like the one at issue in Bullington, place the defendant at risk of death. In the decision which petitioner asks this Court to review, a divided New York Court of Appeals has apparently concluded that the double jeopardy clause applies only to capital sentence enhancement proceedings. (A-1-2) The following courts reached the same conclusion: Denton v. Duckworth, 873 F2d 144 (7th Cir., 1989); Linam v. Griffin, 685 F2d 369 (10th Cir., 1982); People v. Brooks, 559 N.E.2d 859, 866 (Ill. App. Ct., 1990); State v. Lee, 660 S.W.2d 394 (Mo. App., 1983).

A number of courts, however, have concluded that the double jeopardy clause is applicable to trial-like, non-capital sentence enhancement proceedings: Durosko v. Lewis, 882 F2d 357 (9th Cir., 1989); Nelson v. Lockhart, 828 F2d 446 (8th Cir., 1987), rev'd on other grounds, 102 LEd 2d 275; Bullard v. Estelle, 665 F2d 1347 (5th Cir., 1982), cert. granted, 457 US 1116, vacated, 459 US 1139, on remand, 708 F2d 1020; State v. Hennings, 670 P2d 256 (Wash. Sup. Ct., 1983); Ex Parte Augusta, 639 S.W.2d 481 (Tex. Cr. App., 1982); People v. Quintana, 634 P2d 413 (Colo. Sup. Ct., 1981).

The one point on which all courts to have addressed this issue seem to agree is that the double jeopardy clause will not be applicable to a non-trial-like sentence enhancement proceeding; under Bullington, they reason, the sentencing proceeding's likeness to a trial is a sine qua non of the double jeopardy clause's application. See, e.g., People v. Brooks, supra, at 866-867; State v. Hennings, supra, at 258-262; Durosko v. Lewis, supra, at 359; Bullard v. Estelle, supra, at 1361 n. 28.

An ideal case for resolution of this issue would have two key features. The first is that the enhancement proceeding in issue would closely resemble a trial. That the instant case has this feature is demonstrated below.

At issue in a second felony offender proceeding (N.Y. Crim. Proc. Law §400.21 (McKinney, 1983)) is whether the defendant is a "second felony offender". Pursuant to N.Y. Penal Law §70.06 (McKinney 1987), a second felony offender is a defendant who has been convicted of a felony on which sentence was imposed not more

than ten years before commission of the present felony, excluding prison time.

If the People are to prove the defendant a second felony offender, they must file before sentencing a "statement ... setting forth the date and place of each alleged predicate felony conviction." N.Y. Crim. Proc. Law §400.21(2) (McKinney 1983). The defendant is to be provided a copy of the statement, and is to be asked "whether he wishes to controvert any allegation in the statement". N.Y. Crim. Proc. Law §400.21(3) (McKinney 1983). Where the allegations, if any, which the defendant does not wish to controvert are insufficient to prove the defendant a second felony offender, the court must hold a hearing. At the defendant's request, this hearing may not be commenced within less than two days following the defendant's receipt of the second felony offender statement. N.Y. Crim. Proc. Law §400.21(6) (McKinney 1983).

Criminal Procedure Law §400.21(7) specifies the manner in which the hearing is to be conducted: the burden of proof is the People's; the standard of proof is "beyond a reasonable doubt"; and the rules governing admission of evidence are those "applicable to a trial of the issue of guilt."

If the court concludes that the evidence admitted at the hearing establishes beyond a reasonable doubt that the defendant is a second felony offender, the court must sentence him as such. N.Y. Penal Law §70.06(2) (McKinney 1987); N.Y. Crim. Proc. Law §400.21(4) (McKinney 1983).

Thus, the second felony offender proceeding is in no significant respect different from a trial on the issue of guilt or innocence: the burden of proof, the standard of proof, the rules of evidence, and the absence of discretion are common to both[1].

Sailor v. Sculley, 836 F2d 118 (2d Cir. 1987), points up the other feature of this case which makes it particularly well suited for review by this Court. In Sailor, the Court of Appeals for the Second Circuit, reviewing a judgment of the New York State Court of Appeals, concluded that the double jeopardy clause was not violated by holding a second felony offender proceeding after a failure of proof at a prior different type of sentence enhancement proceeding, namely, a persistent felony offender proceeding. The court reasoned that, just as the traditional application of the double jeopardy clause to the guilt - innocence phase of a criminal trial requires that the offenses at issue be the same, so, for the double jeopardy clause to apply to sentence enhancement proceedings, the proceedings must be the same in terms of the elements to be proved in each and the enhanced punishments at risk of which each places the defendant. Id. at 125-126.

Here, as in Bullington, but in contrast to Sailor, petitioner was successively subjected to two identical types of sentence

---

[1] Though it is true that, under New York's second felony offender proceeding, the sentencer is a judge, this Court has held that application of the double jeopardy clause does not depend on whether the sentencer is a judge rather than a jury. Arizona v. Rumsey, 467 US 203, 210 (1984); See, also, Bullard v. Estelle, supra, 655 F2d at 1355 n. 17.

enhancement proceedings. Accordingly, here, insufficient similarity of the successive sentence enhancement proceedings could not be a basis for concluding that the double jeopardy clause is inapplicable.

Thus, this case has two features which make it well suited for use to resolve the question left open by Bullington: the enhancement proceedings in issue are undeniably trial like, and the second enhancement proceeding to which petitioner was subjected was the very same type as the first.

CONCLUSION

If the double jeopardy clause applies to any non-capital sentence enhancement proceeding, it must apply here, where petitioner was subject to a second trial-like sentence enhancement proceeding after a failure of proof at a prior identical type of proceeding. The issue of its applicability was certainly preserved, and has been reviewed by New York's highest court. Accordingly, this case presents an excellent opportunity for this Court to decide an important constitutional question which has divided both federal and state courts.

Respectfully submitted,

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State of New York
Court of Appeals

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3 No. 134
The People &c.,
Respondent,
v.
Wayne Hunt,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Paul J. Connolly, for appellant.
Youel C. Smith, III, for respondent.

Order affirmed for the reasons stated in the memorandum at the Appellate Division (162 AD2d 782). Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock and Bellacosa concur. Judge Kaye dissents and votes to reverse in an opinion.

KAYE, J. (dissenting):

The issue presented in this case is the one we explicitly left open in Sailor, where the court wrote that it was "unnecessary to decide in this appeal whether the prosecution may conduct more than one persistent felony offender or second offender hearing in the same sentencing proceeding after failing to prove the underlying convictions or conviction." (People v Sailor, 65 NY2d 224, 236, cert. denied 474 US 982.)

The second felony offender hearing in Sailor followed a persistent felony offender hearing, and this Court emphasized the wide discretion afforded the judge at the persistent felony offender hearing in rejecting defendant's double jeopardy challenge (65 NY2d at 234). Such discretion is not afforded the judge in the second felony offender hearing. If the prosecution proves beyond a reasonable doubt that defendant is a second felony offender, the judge must impose the appropriate enhanced

sentence (compare, CPL 400.20[10] with CPL 400.21[4] and [7]; see also, Sailor v Scully, 836 F2d 118, 125). In addition, because of the standard of proof at the second felony offender hearing--beyond a reasonable doubt--the procedure resembles a trial (see, Arizona v Rumsey, 467 US 203, 212). By contrast, at a persistent felony offender hearing, matters relating to a defendant's history and character, and the nature and circumstances of his criminal conduct, need only be established by a preponderance of the evidence (CPL 400.21[6]). Thus, the issue raised in this case is not controlled by our decision in Sailor. The Court's holding today enlarges Sailor.

Even apart from what I see as a constitutional infirmity, statutory law seems to prohibit the procedure here. CPL 400.21 provides that "[w]here information available to the court or to the people prior to sentencing for a felony indicates that the defendant may have previously been subjected to a predicate felony conviction, a statement must be filed by the prosecutor before sentence is imposed setting forth the date and place of each alleged predicate felony conviction [emphasis added]." Although this argument was not raised by defendant prior to sentencing, this language suggests that as a matter of statutory law, the prosecution should not be allowed repeated predicate felony offender hearings when it is aware of all prior crimes at the time of the original proceeding (see, Bullington v Missouri, 451 US 430, 445).

I would reverse and remit for resentencing.

* * * * * * * * * * * * * * * * * *

Order affirmed for the reasons stated in the memorandum at the Appellate Division (162 AD2d 782). Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock and Bellacosa concur. Judge Kaye dissents and votes to reverse in an opinion.

Decided July 1, 1991

Supreme Court—Appellate Division
Third Judicial Department

March 23, 1989 56022

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
v
WAYNE HUNT,
Appellant.

CASEY, J.

Appeal from a judgment of the County Court of Rensselaer County (Dwyer, Jr., J.), rendered November 24, 1987, convicting defendant upon his plea of guilty of the crimes of kidnapping in the second degree (two counts), sodomy in the first degree (six counts), sodomy in the second degree (three counts), use of a child in a sexual performance (four counts) and promoting a sexual performance by a child (three counts).

On October 15, 1987, prior to trial and pursuant to a plea bargain, defendant entered a plea of guilty to kidnapping in the second degree (two counts), sodomy in the first degree (six counts), sodomy in the second degree (three counts), use of a child in a sexual performance (four counts) and promoting a sexual performance by a child (three counts). Upon the application of the prosecution that defendant be sentenced as a second felony offender, defendant was sentenced as such in accordance with the terms of the plea bargain to the maximum prison sentences allowed: 12 1/2 to 25 years for each of the convictions of kidnapping and sodomy in the first degree, 7 1/2 to 15 years on each of the convictions of use of a child in a sexual performance, and 3 1/2 to 7 years for each of the convictions of sodomy in the second degree and promoting a sexual performance of a child; all sentences are to run concurrently.

The convictions stemmed from a 60-count indictment accusing defendant of various crimes involving sexual abuse of children. The children included 14 boys and one girl, all ranging in age from 7 to 15 years, and the crimes were alleged to have been committed over a three-year period from 1982 to 1985, predominantly during the summer months and Christmas vacations. Prior to the plea, certain misdemeanor counts of the indictment were dismissed on motion of defendant as being time barred. After reviewing the minutes of the Grand Jury, defendant sought dismissal of other counts, contending they were not supported by legally sufficient evidence or were duplicitous. Before County Court's decision on this motion, the prosecution moved to amend the indictment by deleting 10 counts as time barred and by eliminating the duplicitous language. County

Supreme Court—Appellate Division
Third Judicial Department

Court treated this motion as a cross motion to defendant's motion to dismiss. The motion of defendant was denied and the cross motion of the prosecution was granted.

Defendant now claims that the denial of his motion to dismiss must be considered on this appeal, since his contentions survived his guilty plea. We disagree. After his voluntary plea of guilty, defendant is precluded from raising all issues related to his indictment, except jurisdictional ones (see, e.g., People v Scott, 3 NY2d 148, 152). In New York an indictment is jurisdictionally defective "only if it does not effectively charge the defendant with the commission of a particular crime" (People v Iannone, 45 NY2d 589, 600; accord, People v Ray, 71 NY2d 849, 850). Therefore, by pleading guilty, defendant waived any error made by County Court in allowing amendment of the indictment (see, People v Harris, 117 AD2d 752), as well as challenges based on lack of specificity as to when the crimes occurred and upon alleged duplicity (see, People v Nicholson, 98 AD2d 876). Waiver also applies to the sufficiency of the Grand Jury evidence supporting the indictment (see, People v Cohen, 52 NY2d 584, 587). Contrary to defendant's claim, this rule is not circumvented by raising these issues in a pretrial motion to dismiss (see, id.). In this regard, however, the Court of Appeals has stated that an indictment which fails to accord a defendant "fair notice of the charges made against him, so that he can prepare a defense and in order to avoid subsequent attempts to retry him for the same crime or crimes", is jurisdictionally defective (People v Ray, supra, at 850, quoting People v Wrights, 112 AD2d 38, 39 [Callahan, J., dissenting], revd on dissenting opn below 67 NY2d 749). Applying these stated principles, the indictment herein, in our opinion, satisfies the legal sufficiency and the fair notice requirements (see, People v Morris, 61 NY2d 290, 295). Considering the age of the victims and the amount of time that elapsed between the occurrence of the crimes and the date of the indictment, the two to three-month periods designated in the indictment as the time frame within which the crimes occurred are not so excessive on their face as to be unreasonable (see, People v Keindl, 68 NY2d 410, 419). Therefore, this claim of defendant lacks merit.

Defendant's next contention concerns the validity of his sentencing as a second felony offender. Although defendant did not raise this issue prior to sentencing, it appears that he was improperly sentenced as a predicate felon. The predicate felony, sodomy in the second degree, was alleged to have been committed on November 18, 1985. Inasmuch as no sentence was imposed upon that prior conviction before commission of the present felonies, and since no offense here has been alleged to have been committed after that date, defendant was improperly considered a predicate felon (see, Penal Law § 70.06 [1] [a], [b] [ii]; People v Kotler, 118

Supreme Court—Appellate Division
Third Judicial Department

02d 592, lv denied 67 NY2d 945) and is entitled to resentencing see, People v Giraldo, 106 AD2d 401, 402). The judgment of onviction must, therefore, be modified by vacating the sentences nposed and the matter must be remitted to County Court for efendant's resentencing as a first felony offender.

Judgment modified, on the law, by vacating the sentences iposed; matter remitted to the County Court of Rensselaer County or further proceedings not inconsistent with this court's decision; id, as so modified, affirmed.

KANE, J.P., CASEY, MIKOLL, YESAWICH, JR., and MERCURE, JJ., ncur.

ATT

5479

MAHON

56022

KANE, concur

56832 -

KANE, concur.

Supreme Court—Appellate Division
Third Judicial Department

May 16, 1989

54790 - In the Matter of the Claim of MICHAEL F. CERAMI, Appellant,
v
ROCHESTER CITY SCHOOL DISTRICT et al., Respondents.
WORKERS' COMPENSATION BOARD, Respondent.

Motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals denied, without costs.

MAHONEY, P.J., KANE, CASEY, WEISS and LEVINE, JJ., concur.

56022 - THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v
WAYNE HUNT, Appellant.

Motion for reargument granted, and upon reargument decision dated March 23, 1989 amended so as to delete from the final sentence of the decision prior to the decretal paragraph the words "as a first felony offender".

KANE, J.P., CASEY, MIKOLL, YESAWICH, JR., and MERCURE, JJ., concur.

56832 - RICHARD A. CARLINO, Respondent,
v
COUNTY OF ALBANY, Appellant.

Motion for reargument or for alternative relief denied, without costs.

KANE, J.P., CASEY, MIKOLL, YESAWICH, JR., and MERCURE, JJ., concur.

June 14, 1990

59839

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v

WAYNE HUNT,

Appellant.

CASEY, J.

Appeal from a judgment of the County Court of Rensselaer County (Dwyer, Jr., J.), rendered August 30, 1989, which resentenced defendant following his conviction of the crimes of kidnapping in the second degree (two counts), sodomy in the first degree (six counts), sodomy in the second degree (three counts), use of a child in a sexual performance (four counts) and promoting a sexual performance by a child (three counts).

On November 24, 1987, defendant was sentenced as a second felony offender in Rensselaer County Court to various indeterminate concurrent terms of imprisonment, the greatest of which was 12 1/2 to 25 years upon his plea of guilty to the crimes listed above. The statement filed by the prosecution pursuant to CPL 400.21 accused defendant of having been previously convicted of the felony of sodomy in the second degree, committed on November 18, 1985, for which a sentence of 2 to 4 years was imposed. Defendant did not contest or controvert this 1985 conviction. On appeal, we remitted the matter to County Court for resentencing because no sentence had been imposed on the predicate felony before defendant committed the felonies enumerated above (148 AD2d 836). Inasmuch as sodomy in the second degree was the only prior felony alleged and due to our determination that this crime did not qualify as a predicate felony, we remitted for defendant's resentence "as a first felony offender" (id., at 838). The prosecution then requested and was granted reargument, in which it was shown that the prosecution had another prior felony that it wished to substitute for the sodomy second degree conviction. Based on this showing, we amended our prior decision to delete the words "as a first felony offender". At resentencing, the People relied upon defendant's 1985 conviction in Albany County Court, in which he was sentenced as a second felony offender on the basis of an earlier Federal felony conviction in Louisiana, to establish the existence of the Federal conviction as the predicate felony (see, CPL 400.21 [8]). Defendant was sentenced to the same term as originally imposed.

On this appeal, defendant's only claim is that the principles of double jeopardy precluded the People from seeking to have him sentenced as a second felony offender upon remittal. According to defendant, the prior proceeding to sentence him as a second felony offender, in which the People failed to prove a valid predicate felony, barred the People from seeking to establish a different predicate felony at the resentencing. In a case involving this State's second and persistent felony offender statutes, the Court of Appeals held "that the protections embodied in the double jeopardy clauses of the Federal and State Constitutions do not apply to these enhanced sentencing proceedings" (People v Sailor, 65 NY2d 224, 226, cert denied 474 US 982). Although the Sailor case is distinguisnable on its facts, and it contains some language which appears to limit the scope of its broadly worded holding (id., at 236), we are of the view that the general principles articulated therein (see, id., at 229-235) are equally applicable to this case. Accordingly, we reject defendant's double jeopardy claim (see, People v Sanchez, 131 AD2d 605).

Judgment affirmed.

KANE, J.P., CASEY, MIKOLL, YESAWICH, JR., and HARVEY, JJ., concur.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED FOR REVIEW

1. WHERE THE PETITIONER FAILED TO CONTEST HIS PREDICATE FELON STATUS AT HIS INITIAL SENTENCING, DID RESENTENCING THE PETITIONER AS A PREDICATE FELON TO THE SENTENCE INITIALLY IMPOSED VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

   The New York State Court of Appeals held that it did not.

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STATEMENT OF THE CASE

This case concerns application of New York's second felony offender laws to the sentencing and resentencing of Wayne Hunt, hereinafter referred to as "the petitioner". A brief discussion of these laws precedes a review of the facts of the petitioner's case.

Under New York law, a person who stands convicted of a felony who has a prior judgment of conviction for a "predicate" felony must be sentenced as a second felony offender. N.Y. Penal Law Section 70.06[1][(a). One of the criteria for a predicate felony is that sentencing upon the predicate conviction occur before commission of the present felony. N.Y. Penal Law Section 70.06[1][(b)(ii).

Generally, the court must sentence a second felony offender to a minimum period of imprisonment that is fixed at one-half of the maximum term imposed. N.Y. Penal Law Section 70.06[2], [3], [ ]. With first time felony offenders, the minimum period of imprisonment is generally fixed at one-third of the maximum. N.Y. Penal Law Section 70.00[3].

A statement must be filed by the prosecutor before imposition of sentence when information available to the court or prosecution indicates that the defendant is a second felony offender. The second felony offender statement must set forth the date and place of each alleged predicate felony conviction. N.Y. Crim. Proc. Law Section 400.21[2].

At sentencing, the court must ask the defendant if he wishes to controvert any of the allegations contained in the second

felony offender statement. N.Y. Crim. Proc. Law Section 400.21[3].

Where the uncontroverted allegations in the statement support a finding that the defendant has been subjected to a predicate felony conviction, the court must sentence the defendant as a second felony offender. N.Y. Crim. Proc. Law Section 400.21[4]. Where the defendant controverts an allegation in the statement and the uncontroverted allegations are insufficient to support a finding that the defendant has been subjected to a predicate felony conviction, the court must hold a hearing. N.Y. Crim. Proc. Law Section 400.21[5].

Such a hearing must be before the court without a jury. The prosecution bears the burden of proving beyond a reasonable doubt, through evidence admissible at a criminal trial, that the defendant has been subjected to a predicate felony conviction. N.Y. Crim. Proc. Law Section 400.21[7][(a).

On November 27, 1987, the petitioner was sentenced pursuant to a plea bargain to the agreed term of twelve and one-half to 25 years incarceration, following his pleas of guilty to numerous charges involving the sexual abuse of children.

Prior to imposition of sentence, the prosecutor filed a second felony offender statement. (A.11). The petitioner failed to controvert any allegation in the statement. (A.14-20). He also failed to request an evidentiary hearing pursuant to New York Criminal Procedure Law Section 400.21[7] to contest his status as a predicate felon, and accordingly no such hearing was held. (A.14-20).

Upon the ensuing appeal by the petitioner, the People conceded that the second felony offender statement was defective, because sentencing upon the predicate conviction recited in the statement occurred after commission of the crimes the petitioner had pleaded guilty to in this case.

The New York Supreme Court, Appellate Division, Third Department initially remitted for resentencing as a first felony offender. People v. Hunt, 148 AD2d 836. (A.4-6). The People moved for reargument, drawing the court's attention to the People's earlier request for leave to submit a second felony offender statement at resentencing, as well as the legal and factual basis for the request.

The Third Department granted the motion to reargue, and subsequently deleted from its initial decision the directive that resentencing be as a first felony offender. People v. Hunt, 159 AD2d 530. (A.7).

At resentencing, the People filed another second felony offender statement, (A.21-23), which alleged as the predicate conviction a 1977 federal conviction for kidnapping. Accompanying the statement was documentary proof that this same kidnapping conviction served as the predicate felony for the petitioner's 1985 adjudication as a second felony offender in Albany County, New York. (A.55-61).

The petitioner objected to his resentencing as a second felony offender, claiming inter alia that such resentencing violated the double jeopardy clause of the Fifth Amendment to the United States Constitution. (A.26-28).

The court denied the petitioner's request for an evidentiary hearing on his status as a predicate felon, (A.29-30, A.37), adjudicated him a second felony offender, and resentenced him to the same term originally imposed. (A.48-51).

On appeal from the resentencing, the Third Department rejected the petitioner's contention that double jeopardy principles precluded the People from resentencing him as a second felony offender on remittal. People v. Hunt, 162 AD2d 782. (A.9-10). The New York Court of Appeals affirmed for the reasons stated in the memorandum at the Appellate Division, with Justice Judith Kaye dissenting. People v. Hunt, ___ NY2d ____ (July 1, 1991). (A.1-3).

This petition for writ of certiorari ensued.

SUMMARY OF ARGUMENT

In the context of sentencing, the constitutional protections embodied in the double jeopardy clause of the Fifth Amendment to the United States Constitution are restricted to trial-type determinations of punishment.

No trial-type determination of punishment has ever occurred in petitioner's case.

At his initial sentencing, the petitioner admitted that he had been convicted of the predicate felony alleged in the second felony offender statement, did not request a hearing to challenge the predicate felony, and thus conceded his status as a second felony offender.

It was not an error during a trial-type determination, but rather a technical defect in the second felony offender statement filed at this initial sentencing, which necessitated resentencing.

At resentencing, another second felony offender statement was filed which alleged that defendant's 1977 federal kidnapping conviction constituted a predicate felony. The petitioner at a prior second felony offender sentencing in another case conceded his identity as the perpetrator of the 1977 federal kidnapping conviction. Under New York law, that prior concession was binding upon the petitioner at his resentencing. Because the petitioner's identity as the perpetrator of that kidnapping was the only issue to be resolved at a second felony offender hearing on resentencing, the court properly adjudicated the petitioner a second felony offender, once again without a trial-type hearing.

Further, there is some question whether any application of New York's second felony offender laws would violate the double jeopardy clause. Sentencing as a second felony offender does not in any way relitigate the underlying conviction or elevate the underlying conviction to a higher class of crime, and in these respects does not implicate the double jeopardy clause.

In sum, the petitioner's claim concerns a sentencing document's formal defect which was not brought to the attention of the trial court. This is solely a question of state procedural law. There are no important questions of federal law here which merit the Court's attention.

ARGUMENT

In People v. Sailor, 65 NY2d 224, 229, cert. denied 474 US 982, the New York Court of Appeals stated that in the context of sentencing, the constitutional protections embodied in the double jeopardy clause are restricted to trial-type determinations of punishment.

The petitioner claims that these constitutional safeguards were violated, when he was twice sentenced as a second felony offender to the disposition he bargained for upon his guilty pleas to numerous crimes involving the sexual abuse of children.

The petitioner bases this claim upon a contention that has no basis in fact. He contends that both his initial sentencing and resentencing constituted "trial-like" proceedings on his predicate status. More specifically, he falsely equates his initial sentencing as a second felony offender to an evidentiary hearing on his predicate status at which there was a failure of proof.

The record shows that no evidentiary hearing pursuant to New York Criminal Procedure Law Section 400.21 has ever taken place in this case.

At the initial sentencing, the prosecutor simply presented a second felony offender statement to the court, and the petitioner admitted that he had been convicted of the predicate felony alleged. Neither the petitioner nor his attorney controverted any allegation in the statement. They did not request an evidentiary hearing, and accordingly no such hearing was held.

The People conceded on appeal that the second felony offender statement filed at this sentencing was technically defective, because the predicate felony alleged was committed after the crimes in question. See N.Y. Penal Law Section 70.06[1](b)[ii], N.Y. Crim. Proc. Law Section 400.21[2].

However, neither the People nor the Third Department labelled this formal defect "a failure of evidence". To do so would falsely imply that an evidentiary hearing had been held.

At resentencing, the prosecutor presented a new second felony offender statement to the court. The statement alleges that the petitioner had previously been convicted of a 1977 federal kidnapping charge in Louisiana. The prosecutor also presented a certified copy of a second felony offender statement, filed in the County Court of Albany County, New York in connection with a 1985 grand larceny conviction, which alleged that the petitioner had previously been convicted of the same kidnapping charge. The prosecutor further submitted to the court a certified copy of the 1985 Albany County Court conviction, which recites that the petitioner was sentenced as a second felony offender.

Thus, the second felony offender statements from the 1985 Albany County case and the resentencing allege the same 1977 federal kidnapping conviction as the predicate felony.

Even though the petitioner's attorney at resentencing stated that the petitioner "would put the People to the proof" as to the Louisiana conviction, (A.29), the court correctly held that no

evidentiary hearing was required to determine the issue. See N.Y. Crim. Proc. Law Section 400.21[4], [5].

There was no controvertible allegation in the new predicate felony offender statement which would require the court to hold such a hearing. The petitioner's attorney admitted on the record that the petitioner did not object to the 1985 second felony offender finding by the Albany County Court. (A.32-33). Under New York law, the petitioner's prior concession that the kidnapping conviction constituted a predicate felony and that he had committed it was binding upon him at the resentencing at issue. N.Y. Crim. Proc. Law Section 400.21[8]; People v. Loughlin, 66 NY2d 633, 636.

Thus, the petitioner forever waived a trial-like proceeding on the issue of whether the kidnapping conviction constituted a predicate conviction, and accordingly he has never faced a trial-like proceeding on that issue. The petitioner's identity as the perpetrator of the kidnapping was the sole issue at his resentencing, and he conceded that issue at the 1985 sentencing.

Therefore, the petitioner cannot correctly assert that he has twice faced an ordeal of "anxiety and insecurity" at the penalty phase "equivalent to that faced by defendant at the guilt phase of the criminal trial." People v. Sailor, supra, 65 NY2d at 233.

In this and other respects, the "jeopardy" element of the petitioner's claim is missing.

Petitioner's claim boils down to a sentencing document's formal defect, which he did not bring to the attention of the

original sentencing court, and upon which he hopes to vacate a sentence which was exactly the one he bargained for.

This claim relates solely to a question of state procedural law. As Justice Kaye noted in her dissent to the New York Court of Appeals decision, the prosecution is required to set forth in its second felony offender statement "each alleged predicate conviction." People v. Hunt, ___ NY2d ___, (July 1, 1991). (A.1-3). See N.Y. Crim. Proc. Law Section 400.21[2].

Given the prosecution's initial failure to allege that the kidnapping conviction constituted a predicate conviction, our state's highest court had the power to bar the petitioner's resentencing as a sanction for this procedural violation. That sanction was appropriately declined.

This is not a case where the prosecution has held repeated evidentiary hearings on the same issue until it got the result it wanted. Again, no "trial-like" proceeding was ever held. The court below simply held that double jeopardy principles did not bar the petitioner's resentencing, where he failed to object to a technical defect in a sentencing document while conceding his predicate status at his initial sentencing.

Moreover, some question whether any application of New York's second felony offender laws would violate the double jeopardy clause.

In People v. Sailor, supra, the New York Court of Appeals noted that the second felony offender statute concerns itself solely with the defendant's prior criminal record, and that our legislature did not intend that this prior criminal record be

used as an aggravating element of the substantive offense elevating it to a higher class. Hence, sentencing as a second felony offender does not change the class of the underlying conviction, and in that respect does not implicate double jeopardy. People v. Sailor, 65 NY2d at 232-233.

In contrast, punishment of death is part and parcel of the substantive offense of capital murder, because of the presence of aggravating circumstances related to the commission of the murder which elevate the punishment from mere life imprisonment. Accordingly, the defendant's sentence of life imprisonment at his first trial was deemed an implicit acquittal of the death penalty by this Court in Bullington v. Missouri, 451 US 430.

As an additional ground for denial of the petition for writ of certiorari, the People thus submit that application of New York's second felony offender laws generically do not implicate the double jeopardy clause.

CONCLUSION

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED IN ALL RESPECTS.

APPENDIX

State of New York
Court of Appeals

3 No. 134
The People &c.,
Respondent,
v.
Wayne Hunt,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Paul J. Connolly, for appellant.
Youel C. Smith, III, for respondent.

Order affirmed for the reasons stated in the memorandum at the Appellate Division (162 AD2d 782). Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock and Bellacosa concur. Judge Kaye dissents and votes to reverse in an opinion.

KAYE, J. (dissenting):

The issue presented in this case is the one we explicitly left open in Sailor, where the court wrote that it was "unnecessary to decide in this appeal whether the prosecution may conduct more than one persistent felony offender or second offender hearing in the same sentencing proceeding after failing to prove the underlying convictions or conviction." (People v Sailor, 65 NY2d 224, 236, cert. denied 474 US 982.)

The second felony offender hearing in Sailor followed a persistent felony offender hearing, and this Court emphasized the wide discretion afforded the judge at the persistent felony offender hearing in rejecting defendant's double jeopardy challenge (65 NY2d at 234). Such discretion is not afforded the judge in the second felony offender hearing. If the prosecution proves beyond a reasonable doubt that defendant is a second felony offender, the judge must impose the appropriate enhanced

sentence (compare, CPL 400.20[10] with CPL 400.21[4] and [7]; see also, Sailor v Scully, 836 F2d 118, 125). In addition, because of the standard of proof at the second felony offender hearing--beyond a reasonable doubt--the procedure resembles a trial (see, Arizona v Rumsey, 467 US 203, 212). By contrast, at a persistent felony offender hearing, matters relating to a defendant's history and character, and the nature and circumstances of his criminal conduct, need only be established by a preponderance of the evidence (CPL 400.21[6]). Thus, the issue raised in this case is not controlled by our decision in Sailor. The Court's holding today enlarges Sailor.

Even apart from what I see as a constitutional infirmity, statutory law seems to prohibit the procedure here. CPL 400.21 provides that "[w]here information available to the court or to the people prior to sentencing for a felony indicates that the defendant may have previously been subjected to a predicate felony conviction, a statement must be filed by the prosecutor before sentence is imposed setting forth the date and place of each alleged predicate felony conviction [emphasis added]." Although this argument was not raised by defendant prior to sentencing, this language suggests that as a matter of statutory law, the prosecution should not be allowed repeated predicate felony offender hearings when it is aware of all prior crimes at the time of the original proceeding (see, Bullington v Missouri, 451 US 430, 445).

I would reverse and remit for resentencing.

* * * * * * * * * * * * * * * * * *

Order affirmed for the reasons stated in the memorandum at the Appellate Division (162 AD2d 782). Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock and Bellacosa concur. Judge Kaye dissents and votes to reverse in an opinion.

Decided July 1, 1991

Supreme Court—Appellate Division
Third Judicial Department

March 23, 1989 56022

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v

WAYNE HUNT,
Appellant.

CASEY, J.

Appeal from a judgment of the County Court of Rensselaer County (Dwyer, Jr., J.), rendered November 21, 1987, convicting defendant upon his plea of guilty of the crimes of kidnapping in the second degree (two counts), sodomy in the first degree (six counts), sodomy in the second degree (three counts), use of a child in a sexual performance (four counts) and promoting a sexual performance by a child (three counts).

On October 15, 1987, prior to trial and pursuant to a plea bargain, defendant entered a plea of guilty to kidnapping in the second degree (two counts), sodomy in the first degree (six counts), sodomy in the second degree (three counts), use of a child in a sexual performance (four counts) and promoting a sexual performance by a child (three counts). Upon the application of the prosecution that defendant be sentenced as a second felony offender, defendant was sentenced as such in accordance with the terms of the plea bargain to the maximum prison sentences allowed: 12 1/2 to 25 years for each of the convictions of kidnapping and sodomy in the first degree, 7 1/2 to 15 years on each of the convictions of use of a child in a sexual performance, and 3 1/2 to 7 years for each of the convictions of sodomy in the second degree and promoting a sexual performance of a child; all sentences are to run concurrently.

The convictions stemmed from a 60-count indictment accusing defendant of various crimes involving sexual abuse of children. The children included 14 boys and one girl, all ranging in age from 7 to 15 years, and the crimes were alleged to have been committed over a three-year period from 1982 to 1985, predominantly during the summer months and Christmas vacations. Prior to the plea, certain misdemeanor counts of the indictment were dismissed on motion of defendant as being time barred. After reviewing the minutes of the Grand Jury, defendant sought dismissal of other counts, contending they were not supported by legally sufficient evidence or were duplicitous. Before County Court's decision on this motion, the prosecution moved to amend the indictment by deleting 10 counts as time barred and by eliminating the duplicitous language. County

Supreme Court—Appellate Division
Third Judicial Department

Court treated this motion as a cross motion to defendant's motion to dismiss. The motion of defendant was denied and the cross motion of the prosecution was granted.

Defendant now claims that the denial of his motion to dismiss must be considered on this appeal, since his contentions survived his guilty plea. We disagree. After his voluntary plea of guilty, defendant is precluded from raising all issues related to his indictment, except jurisdictional ones (see, e.g., People v Scott, 3 NY2d 148, 152). In New York an indictment is jurisdictionally defective "only if it does not effectively charge the defendant with the commission of a particular crime" (People v Iannone, 45 NY2d 589, 600; accord, People v Ray, 71 NY2d 849, 850). Therefore, by pleading guilty, defendant waived any error made by County Court in allowing amendment of the indictment (see, People v Harris, 117 AD2d 752), as well as challenges based on lack of specificity as to when the crimes occurred and upon alleged duplicity (see, People v Nicholson, 98 AD2d 876). Waiver also applies to the sufficiency of the Grand Jury evidence supporting the indictment (see, People v Cohen, 52 NY2d 584, 587). Contrary to defendant's claim, this rule is not circumvented by raising these issues in a pretrial motion to dismiss (see, id.). In this regard, however, the Court of Appeals has stated that an indictment which fails to accord a defendant "'fair notice of the charges made against him, so that he can prepare a defense and in order to avoid subsequent attempts to retry him for the same crime or crimes'", is jurisdictionally defective (People v Ray, supra, at 850, quoting People v Wrights, 112 AD2d 38, 39 [Callahan, J., dissenting], revd on dissenting opn below 67 NY2d 749). Applying these stated principles, the indictment herein, in our opinion, satisfies the legal sufficiency and the fair notice requirements (see, People v Morris, 61 NY2d 290, 295). Considering the age of the victims and the amount of time that elapsed between the occurrence of the crimes and the date of the indictment, the two to three-month periods designated in the indictment as the time frame within which the crimes occurred are not so excessive on their face as to be unreasonable (see, People v Keindl, 68 NY2d 410, 419). Therefore, this claim of defendant lacks merit.

Defendant's next contention concerns the validity of his sentencing as a second felony offender. Although defendant did not raise this issue prior to sentencing, it appears that he was improperly sentenced as a predicate felon. The predicate felony, sodomy in the second degree, was alleged to have been committed on November 18, 1985. Inasmuch as no sentence was imposed upon that prior conviction before commission of the present felonies, and since no offense here has been alleged to have been committed after that date, defendant was improperly considered a predicate felon (see, Penal Law § 70.06 [1] [a], [b] [ii]; People v Kotler, 118

AD2d 592, lv denied 67 NY2d 945) and is entitled to resentencing (see, People v Giraldo, 106 AD2d 401, 402). The judgment of conviction must, therefore, be modified by vacating the sentences imposed and the matter must be remitted to County Court for defendant's resentencing as a first felony offender.

Judgment modified, on the law, by vacating the sentences imposed; matter remitted to the County Court of Rensselaer County for further proceedings not inconsistent with this court's decision; and, as so modified, affirmed.

KANE, J.P., CASEY, MIKOLL, YESAWICH, JR., and MERCURE, JJ., concur.

May 16, 1989

54790 - In the Matter of the Claim of MICHAEL F. CERAMI, Appellant,
v
ROCHESTER CITY SCHOOL DISTRICT et al., Respondents.
WORKERS' COMPENSATION BOARD, Respondent.

Motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals denied, without costs.

MAHONEY, P.J., KANE, CASEY, WEISS and LEVINE, JJ., concur.

56022 - THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v
WAYNE HUNT, Appellant.

Motion for reargument granted, and upon reargument decision dated March 23, 1989 amended so as to delete from the final sentence of the decision prior to the decretal paragraph the words "as a first felony offender".

KANE, J.P., CASEY, MIXOLL, YESAWICH, JR., and MERCURE, JJ., concur.

56832 - RICHARD A. CARLINO, Respondent,
v
COUNTY OF ALBANY, Appellant.

Motion for reargument or for alternative relief denied, without costs.

KANE, J.P., CASEY, MIXOLL, YESAWICH, JR., and MERCURE, JJ., concur.

State of New York
Court of Appeals

BEFORE: HON. JOSEPH W. BELLACOSA, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

Wayne Hunt,
Appellant.

CERTIFICATE DENYING LEAVE

I, JOSEPH W. BELLACOSA, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
May 26, 19 89

Joseph W Bellacosa
Associate Judge

*Description of Order: Order of the Appellate Division, Third Department, dated March 23, 1989, modifying a judgment of the County Court, Rensselaer County, rendered November 24, 1987; and, as so modified, affirmed.

Supreme Court—Appellate Division
Third Judicial Department

June 14, 1990 59839

THE PEOPLE OF THE STATE OF
NEW YORK,
Respondent,
v
WAYNE HUNT,
Appellant.

CASEY, J.

Appeal from a judgment of the County Court of Rensselaer County (Dwyer, Jr., J.), rendered August 30, 1989, which resentenced defendant following his conviction of the crimes of kidnapping in the second degree (two counts), sodomy in the first degree (six counts), sodomy in the second degree (three counts), use of a child in a sexual performance (four counts) and promoting a sexual performance by a child (three counts).

On November 24, 1987, defendant was sentenced as a second felony offender in Rensselaer County Court to various indeterminate concurrent terms of imprisonment, the greatest of which was 12 1/2 to 25 years upon his plea of guilty to the crimes listed above. The statement filed by the prosecution pursuant to CPL 400.21 accused defendant of having been previously convicted of the felony of sodomy in the second degree, committed on November 18, 1985, for which a sentence of 2 to 4 years was imposed. Defendant did not contest or controvert this 1985 conviction. On appeal, we remitted the matter to County Court for resentencing because no sentence had been imposed on the predicate felony before defendant committed the felonies enumerated above (148 AD2d 836). Inasmuch as sodomy in the second degree was the only prior felony alleged and due to our determination that this crime did not qualify as a predicate felony, we remitted for defendant's resentence "as a first felony offender" (id., at 838). The prosecution then requested and was granted reargument, in which it was shown that the prosecution had another prior felony that it wished to substitute for the sodomy second degree conviction. Based on this showing, we amended our prior decision to delete the words "as a first felony offender". At resentencing, the People relied upon defendant's 1985 conviction in Albany County Court, in which he was sentenced as a second felony offender on the basis of an earlier Federal felony conviction in Louisiana, to establish the existence of the Federal conviction as the predicate felony (see, CPL 400.21 [8]). Defendant was sentenced to the same term as originally imposed.

On this appeal, defendant's only claim is that the principles of double jeopardy precluded the People from seeking to have him sentenced as a second felony offender upon remittal. According to defendant, the prior proceeding to sentence him as a second felony offender, in which the People failed to prove a valid predicate felony, barred the People from seeking to establish a different predicate felony at the resentencing. In a case involving this State's second and persistent felony offender statutes, the Court of Appeals held "that the protections embodied in the double jeopardy clauses of the Federal and State Constitutions do not apply to these enhanced sentencing proceedings" (People v Sailor, 65 NY2d 224, 226, cert denied 474 US 982). Although the Sailor case is distinguishable on its facts, and it contains some language which appears to limit the scope of its broadly worded holding (id., at 236), we are of the view that the general principles articulated therein (see, id., at 229-235) are equally applicable to this case. Accordingly, we reject defendant's double jeopardy claim (see, People v Sanchez, 131 AD2d 605).

Judgment affirmed.

KANE, J.P., CASEY, MIKOLL, YESAWICH, JR., and HARVEY, JJ., concur.

STATEMENT PURSUANT TO SECTION 400.21 OF THE CRIMINAL PROCEDURE LAW, DATED NOVEMBER 24, 1987

STATE OF NEW YORK
COUNTY COURT COUNTY OF RENSSELAER

THE PEOPLE OF THE STATE OF NEW YORK -against- WAYNE HUNT, Defendant.	STATEMENT PURSUANT TO SECTION 400.21 OF THE CRIMINAL PROCEDURE LAW C-7031

STATE OF NEW YORK]
COUNTY OF RENSSELAER] SS:

JAMES B. CANFIELD, being duly sworn, deposes and says:

FIRST: That he is an attorney at law, duly licensed to practice law in the State of New York, and the duly elected District Attorney in and for the County of Rensselaer, New York.

SECOND: That this statement is filed pursuant to Section 400.21 of the Criminal Procedure Law of the State of New York, and that the sources of his information and grounds for his belief as to all matters hereinafter set forth, are papers on file in the Office of the District Attorney.

THIRD: That the defendant, WAYNE HUNT, having been convicted of two counts of KIDNAPPING IN THE SECOND DEGREE, A class B felony, in violation of Section 135.20 of the Penal Law of the State of New York, four counts of USE OF A CHILD IN A SEXUAL PERFORMANCE IN THE THIRD DEGREE, a class C felony, in violation of Section 263.05 of the Penal Law of the State of New York, three counts of PROMOTING A SEXUAL PERFORMANCE BY A CHILD, A class D felony, in violation of Section 263.15, six counts of SODOMY IN THE FIRST DEGREE, A class B felony, in violation of Section 130.50 of the Penal Law of the State of New York and three counts of

STATEMENT PURSUANT TO SECTION 400.21 OF THE CRIMINAL PROCEDURE LAW, DATED NOVEMBER 24, 1987

SODOMY IN THE SECOND DEGREE, a class D felony, in violation of Section 130.45 of the Penal Law of the State of New York that before commencement of a plea of guilty, the People elect to proceed against the defendant as a Second Felony Offender and the Court having set the 24TH day of November, 1987 for sentencing, the People seek Second Felony sentencing for the defendant.

FOURTH: That pursuant to Section 400.21 of the Criminal Procedure Law, the People hereby state that the defendant, WAYNE HUNT, has been previously convicted of SODOMY IN THE SECOND DEGREE, a class D felony, in violation of Section 130.45 of Section 140.20 of the Penal Law of the State of New York, on November 18, 1985, a Felony, for which a sentencing in the Rensselaer County Court to a period of incarceration of two to four years in a state penitentiary was imposed. This previous felony conviction occurred within the past ten years and occurred in the State of New York. Therefore, deponent hereby requests that this Court sentence the defendant as a Second Felony Offender.

JAMES B. CANFIELD
DISTRICT ATTORNEY

Sworn to before me this
24th day of November, 1987.

Pauline Sweet
NOTARY PUBLIC
MY COMMISSION EXPIRES 7/31/88

NOVEMBER 27, 1987 SENTENCING MINUTES

COUNTY COURT OF THE STATE OF NEW YORK

COUNTY OF RENSSELAER CRIMINAL TERM

#1
166459

THE PEOPLE OF THE STATE OF NEW YORK

against Indictment C-7130

WAYNE HUNT,

Defendant.

AUG 20 11 52 AM '09
OFFICE OF

Congress & Second Streets
Troy, New York 12180

November 24, 1987

SENTENCING

Before: HON. M. ANDREW DWYER, JR.,
County Court Judge

Appearances:

JAMES B. CANFIELD, ESQ.,
Rensselaer County District Attorney
Congress & Second Street
Troy, New York 12180
By: BRIAN PREMO, ESQ., Asst. District Attorney, of counsel.

Defendant, WAYNE HUNT, Present.

LAWRENCE C. CONNERS, ESQ.,
Attorney for Wayne Hunt
Rensselaer County Public Defender
Congress & Second Street
Troy, New York 12180

Mark A. McConchie, Court Reporter
Calway, New York 12074

Wayne Hunt C-7071 - 11-24-87.

MR. PREMO: Your Honor, the record should reflect the presence of the defendant with his attorney Mr. Conners, Public Defender, Rensselaer County. The record should also reflect on the 15th day of October 1987, defendant entered a plea of guilty to several of the counts in the indictment as amended, 2 counts second degree--4 counts use of a child in a sexual performance, 3 counts promoting, 6 counts Sodomy First Degree, 3 counts Sodomy Second Degree. A presentence investigation was ordered. I believe the court is in receipt thereof and defense counsel has had an opportunity to review same. Your Honor, at this time I move to sentence and prior to sentence, your Honor, the record should reflect I am handing to the court original and duplicate original of statement pursuant to Section 400.21 C.P.L. and handing same to defense counsel.

THE COURT: Wayne Hunt, do you have legal cause why judgment should not be pronounced.

THE DEFENDANT: No your Honor.

THE COURT: Mr. Conners, as his counsel, do you?

MR. CONNERS: No sir.

THE COURT: Mr. Hunt, were you

previously convicted of at least one felony in this court during a previous term of this court?

THE DEFENDANT: Yes, your Honor.

MR. CONNERS: November 18, 1985.

THE COURT: Yes, I am looking for it here gentlemen; November 18, 1985. You admit that conviction sir?

THE DEFENDANT: Yes sir.

THE COURT: Thank you. Do the people have a statement before sentencing?

MR. PREMO: Your Honor, this case has been conferenced and discussed at length on the record. I have no other statement other than the court realizes the plea bargain in this case and the People would, of course, wish that the court abide by that.

THE COURT: What did you say?

MR. PREMO: I would wish that the court would follow the plea agreement which you are well aware of. I believe the agreement was he be sentenced to 12 and a half to 25 years on the 2 kidnapping charges, to 7 and a half to 15 years on the 4 counts of use of a child in sexual performance, to 3 and a half to 7 years on 3 counts of promoting a sexual performance by a child, 12 and a half to 25 years on the 6 counts of sodomy first

degree and to 3 and a half to 7 years on the 3 counts of sodomy in the second degree. Of course that would be, the sentences would be on each count to run concurrently.

THE COURT: I had that note but wanted to make certain we were in agreement. Further than that, do you have any statement?

MR. PREMO: No your honor.

THE COURT: Mr. Conners, do you have a statement on behalf of your client?

MR. CONNERS: No sir.

THE COURT: Mr. Hunt, you don't have to say a word if you don't want to but you have an absolute legal right to say anything you want to say. Was there anything you wanted to put on the record?

THE DEFENDANT: No your Honor.

THE COURT: Wayne Hunt, upon your plea of kidnapping and, in the second degree to 2 separate counts, it is the sentence and judgment of this court as to each of those counts that you be sentenced to an indeterminant sentence of imprisonment which shall have a maximum term of 25 years and this court hereby imposes a minimum period of imprisonment pursuant to statute of 12 and one half years and directs that you be committed to the custody of the New York State Department

of Correctional Services and be delivered to the Downstate Correctional Facility at Peekskill, New York there to be dealt with in accordance with law. If, in fact, you are presently serving time in an institution it may be that you will be taken directly back there rather than to the reception center. These sentences, of course, will run concurrently each as to the other.

As to the pleas of guilty to sodomy in each of 6 separate counts and as to each of the separate counts, it is the judgment of this court that you be sentenced to an indeterminate sentence of imprisonment which shall have a maximum term of 25 years and this court pursuant to statute hereby imposes a minimum period of 12 and one half years and directs that you be committed to the custody of the New York State Department of Correctional Services and be delivered to the Downstate Correctional Facility at Peekskill, New York there to be dealt with in accordance with law.

MR. PREMO: Just to clarify the record, those "D" were the Sodomy First Degrees?

THE COURT: They are Sodomy First Degrees.

MR. PREMO: You just said sodomy.

THE COURT: Sodomy First Degree.

They are "B" felonies and that is the purpose of the sentence. These sentences are to run concurrently to each other and concurrently to the sentences under kidnapping second. In reference to your plea of guilty to the Use of a Child in a Sexual Performance in 4 separate counts individually and as to each of those counts, it is the sentence and judgment of this court that you be sentenced to an indeterminate sentence of imprisonment which shall have a maximum term of 15 years and this court hereby imposes a minimum period of imprisonment pursuant to statute of 7 and one half years. These sentences are to run concurrently each as to the other and as to the sentence for Sodomy in the First Degree and as to the Kidnapping, Attempted Kidnapping charge. And they are all to run concurrently each as to the other. And the court directs you be committed to the custody of the New York State Department of Correctional Services and be delivered to the Downstate Correctional Facility at Peekskill, New York there to be dealt with in accordance with law.

THE COURT: As to the pleas of guilty to Sodomy in the Second Degree in 3 separate counts and as to each of them and individually as to each of them, it is the sentence and judgment of this court that you be

sentenced to an indeterminate sentence of imprisonment which shall have a maximum term of 7 years and this court hereby imposes a minimum period of imprisonment of 3 and one half years pursuant to statute and directs you be committed to the New York State Department of Correctional Services and be delivered to the Downstate Correctional Facility at Peekskill, New York there to be dealt with in accordance with law. As to your pleas of guilty to promoting sexual performance by a child in 3 separate counts and as to each of those counts individually it is the sentence of this court that you be sentenced to an indeterminate sentence of imprisonment which shall have a maximum term of 7 years and the court hereby imposes a minimum period of imprisonment pursuant to statute of 3 and one half years and directs you be committed to the custody of the New York State Department of Correctional Services and be delivered to the Downstate Correctional Facility at Peekskill, New York there to be dealt with in accordance with law. The sentence as to each of these counts in this particular indictment number C-7031 are to run concurrently each as to the other. Would you please Mr. Conners advise him of his right to appeal.

MR. CONNERS: Yes. Mr. Hunt you have

30 days in which to appeal the judgment of conviction, the sentence imposed upon you by the court this date. If you wish to appeal you may do so by contacting myself or any attorney and the necessary appeals papers will be filed in your behalf. If I may have a moment your Honor I would ask my client to sign the notification of right of appeal and I will hand the original up to the court for its record.

THE COURT: Thank you.

MR. PREMO: Thank you your Honor. May the record show I am handing to the court Notification of Right of appeal pursuant to Section 821.2 of the rules of the Appellate Division dated the 24th day of November 1987 and signed by my client Wayne Hunt and by myself. May the record also show I am handing fully executed copy of same notification to my client Mr. Hunt.

(Whereupon matter concluded).

EXHIBIT A - PEOPLE'S SECOND FELONY OFFENDER STATEMENT

STATE OF NEW YORK
COUNTY COURT COUNTY OF RENSSELAER

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

SECOND FELONY OFFENDER STATEMENT
INDICTMENT C-7031

WAYNE HUNT,

Defendant.

STATE OF NEW YORK)
COUNTY OF RENSSELAER) SS:
CITY OF TROY)

YOUEL C. SMITH III, being duly sworn, deposes and says:

1. I am an Assistant District Attorney in and for the County of Rensselaer, assigned to the prosecution of this case.

2. This statement is filed pursuant to Section 400.21 of the Criminal Procedure Law of the State of New York.

3. The source of my information and grounds for my belief as to all matters hereinafter set forth are papers on file in the Office of the District Attorney.

4. On November 24, 1987, the defendant was convicted upon his plea of guilty to two counts of KIDNAPPING IN THE SECOND DEGREE, a class B felony, in violation of Section 135.20 of the Penal Law of the State of New York, four counts of USE OF A CHILD IN A SEXUAL PERFORMANCE, a class C felony, in violation of Section 263.05 of the Penal Law of the State of New York, six counts of SODOMY IN THE FIRST DEGREE, a class B felony, in violation of Section 130.50 of the Penal Law of the State of New York, and three counts of SODOMY IN THE SECOND DEGREE, a class D felony, in violation

of Section 130.45 of the Penal Law of the State of New York.

5. Upon the defendant's subsequent appeal of the judgment of conviction and sentence, the Appellate Division vacated the sentences imposed and remitted the matter to County Court for resentencing. See Decision of Third Department, dated March 23, 1979, and May 16, 1989, respectively (attached).

6. Pursuant to Section 400.21 of the Criminal Procedure Law, the People, prior to the date of resentencing, elect to proceed against the defendant as a second felony offender.

7. The People allege that WAYNE HUNT has been previously convicted of KIDNAPPING in violation of Section 1201 of Title 18 of the United States Code on February 14, 1977, upon which conviction the United States District Court for the Western District of Louisiana, Opelousas Division, imposed a sentence of incarceration of ten years. See certificate copy of conviction (attached).

8. Said conviction was of an offense for which a sentence to a term of imprisonment in excess of one year was authorized, and is authorized in this state.

9. Sentence upon such prior conviction was imposed before commission of the present felonies.

10. Sentence upon such prior conviction was imposed not more than ten years before commission of the felonies of which the defendant presently stands convicted.

WHEREFORE, deponent hereby requests that this Court sentence the defendant as a Second Felony Offender.

YOUEL C. SMITH III
Assistant District Attorney

Sworn to before me this 24th day of July, 1989.

Notary Public
Commissioner of Deeds

My commission expires 2/2/91.

C-7031 - 8-30-89.

THE COURT: Has anybody heard from defense counsel Connolly?

MR. SMITH: Yes. I just saw Connolly a moment ago, your Honor.

(Whereupon, short pause taken.)

MR. SMITH: Your Honor, we are here for resentencing on People versus Wayne Hunt. That would be Indictment number C-7031. The record should reflect the presence of Mr. Hunt in the courtroom with his attorney, Paul Connolly, of Albany. The record should also reflect that on November 24, 1987, the defendant was convicted upon his plea of guilty to two counts of Kidnapping in the Second Degree; four counts of Use of a Child in a Sexual Performance; six counts of Sodomy in the First Degree; three counts of Sodomy in the Second Degree, and upon those pleas, was sentenced to a total plea-bargained-for sentence of twelve and a half to twenty-five years as a predicate felon. Upon his subsequent appeal of the judgment of conviction and sentence the Appellate Division vacated the sentences imposed and remitted the matter to County Court for resentencing, with permission granted to the People to file a second felony offender statement at that time and

the people have filed such a statement in a timely fashion, and at this time, your Honor, I move for sentence.

THE COURT: I am waiting to get the file.

MR. SMITH: Your Honor, while we are waiting for the file, I would like to hand some documents up to the Court. I have provided copies of all these documents to Mr. Connelly. The first document is certified copy of 1985 Albany County conviction for Grand Larceny in the Third Degree, and the significance of this conviction is that the predicate felony used for that Albany County conviction is the same felony that we are using in our present second felony offender statement in this case and the defendant did not contest that 1977 felony conviction of Louisiana in the Albany County case and I believe the Court of Appeals has spoken in this and that is a copy of that case submitted herewith that he has therefore waived the issue. Here is the certified copy of the indictment in that case, a certified copy of the special information charging him as a predicate in that case, which recites the Louisiana conviction. The certificate of conviction in the Albany case, a certified copy of the indictment of the Louisiana case, certified

copy of the plea bargain memorandum in the Louisiana case. Certified copy of the affidavit of understanding of maximum penally and constitutional rights in the Louisiana case, the certified copy of the original sentence in the Louisiana case which sentenced the defendant to life imprisonment and then the certified copy of the subsequent sentencing in which that life sentence was commuted to ten years in prison and finally a copy of People vs Kenneth Laughlin which is a Court of Appeals case, which stands for the proposition that, having not contested the prior conviction used to predicate the Albany County conviction, that the issue of its appropriateness as a predicator in this case is now res ajudacata too and can no longer be contested.

THE COURT: Mr. Donnolly.

MR. CONNOLLY: Connolly, your Honor.

THE COURT: Connolly?

MR. CONNOLLY: That is right. I would like the record to reflect that I have served on the Court sometime ago, I don't recall the exact date, a motion seeking an order precluding the defendant here, Wayne Smith, being sentenced, Wayne Hunt, I am sorry, being sentenced as a second felony offender on the ground that there was a prior hearing held in this matter to

determine whether or not he was a second felony offender and in which hearing the evidence adduced by the People was insufficient as a matter of law and I would cite the Court, to the Court, United States versus Bullington, case found at 451 U.S., and I don't recall the exact page in which the Supreme Court of the United States held that in a case which is substantially similar to this point--

THE COURT: What is the date of the Supreme Court case?

MR. CONNOLLY: Pardon?

THE COURT: What is the date of that Supreme Court case.

MR. CONNOLLY: I believe approximately 1985, your Honor.

THE COURT: Well, the case which is submitted by Mr. Smith is October 8, 1985.

MR. CONNOLLY: I believe they are directed at different issues, your Honor. The case which I am citing to the court concerns the double jeopardy clause of the United States Constitution and it is my contention that sentencing, that to subject the defendant here, Wayne Hunt, to another second felony offender hearing after there already having been one, and after the People's proof at that hearing was found to be

inadequate as a matter of law, violates the double jeopardy case of both New York State and the United States Constitution.

THE COURT: Your client was sentenced on the 24 of November 1987. At that time he was sentenced as a predicate felony offender.

MR. CONNOLLY: That is right, your Honor.

THE COURT: When do you say that hearing was held?

MR. CONNOLLY: There either was a hearing at that time, your Honor, or the defendant waived the right to a formal hearing, but nevertheless, he was subjected to jeopardy with respect to the issue of whether he was a second felony offender.

THE COURT: It was not objected to at that time. He was sentenced as a second felony offender.

MR. SMITH: Besides, your Honor--

MR. CONNOLLY: I believe that is correct, your Honor.

THE COURT: Well, then the issue was raised on appeal.

MR. SMITH: The Court of Appeals has directly addressed this issue in People versus Sailor and

found the double jeopardy clause is not implicated by resentencing as a second felony offender and I have submitted memorandum to the court to that effect.

THE COURT: Is there any contention that this Louisiana conviction is not an outstanding conviction?

MR. CONNOLLY: Your Honor, I would put the People to the proof. It is the People's burden to prove that.

THE COURT: I think they have done that by giving us certified copies of that conviction.

MR. CONNOLLY: Your Honor, I would formally request that a hearing be held to determine whether the defendant, Wayne Hunt, is a second felony offender.

THE COURT: In other words, you would like to have a hearing, at which time Mr. Smith, instead of simply handing this evidence up to the court, would produce some member of his office who made these inquiries and say, "And did you communicate with Louisiana, and did you get certain correspondence? Yes," and I mark this exhibits 1, 2, and 3 for the People, and you would call that proof?

MR. CONNOLLY: That is correct, your

Honor, I would like a hearing.

THE COURT: You don't accept the fact we have certified copies of indictment and conviction in the State of Louisiana.

MR. CONNOLLY: That is correct.

MR. SMITH: Section 400.21 Sub. 5 of the Criminal Procedure Law and Subdivision 3 state that, where the uncontroverted allegations in the statement are sufficient to support a finding that the defendant has been subjected to a predicate felony conviction the court must enter such finding and when imposing sentence must sentence the defendant in accordance with the law and--

THE COURT: I don't think there is any question about that being the law.

MR. SMITH: I don't think there is any question and don't think he is entitled to a hearing.

THE COURT: And your burden now, if the burden ever shifts from the prosecution, the prosecution met its burden and made out a prima-facie case that your client is a second felony offender. He has produced all the documentary evidence from the State of Louisiana showing that to be the fact. If you can controvert that, you have an opportunity.

MR. CONNOLLY: I would like the record to reflect, at this time, that the defendant has also made a motion to the Court and it was made some time ago and I am sure your Honor is in receipt of it, raising the issue which--

THE COURT: The motion was against predicate felony offender treatment. If--

MR. CONNOLLY: On two grounds, your Honor. One ground was the double jeopardy clause. I have addressed that. I don't know what your Honor's decision is with respect to that issue, but there is other grounds. The other is that the Louisiana conviction is for a crime, violation of, I believe, 18 USC 1201 kidnaping, federal statute, which prohibits conduct which may be either a misdemeanor or a felony in the State of New York. There is no way of knowing whether the defendant's conduct was a misdemeanor or a felony and in order for a conviction in another jurisdiction to be used as a predicate offense in the State of New York, it must be clear that the statute violated proscribed conduct which, in New York, amounts only to a felony and does not in any case, amount to a misdemeanor.

THE COURT: U.S. District Court for

the Western District of Louisiana provides, that at the time that he signed this affidavit of understanding, and constitutional rights, that he was subjected to imprisonment for any term of years or for life and in the State of New York any sentence of over one year is a felony. The statute--the indictment claimed that he had kidnapped one Keith James Thibedeau and that he had been held for ransom, reward, or otherwise in violation of Title 18, United States Codes. That also would be considered a felony under the law of the State of New York.

MR. SMITH: And, in fact, the indictment, the federal indictment alleges that Keith James Thibedeau was taken from the State of Louisiana to the State of Georgia, but I agree with the court that the Louisiana conviction would be a felony in the State of New York, but the Court of Appeals has all said that this issue is moot, because he did not contest that issue when that Louisiana conviction was used to predicate him back in 1985 in Albany County Court.

MR. CONNOLLY: Your Honor, with respect to the issue just raised by Mr. Smith, I would like the record to reflect that Mr. Hunt--Mr. Hunt, it is true, did not object to the use of the second felony

offender--did not object to the second felony offense finding in 1985, but Mr. Hunt's counsel in this case was ineffective and think that ineffectiveness could be found as a matter of law in as much as for the reason I just presented to the Court, the Louisiana conviction, in fact, does not amount to a predicate felony for purposes of New York law. Mr. Hunt's counsel in 1985, I believe, your Honor, was remiss in not raising that issue at that time and his failure to raise the issue constitutes ineffective assistance of counsel as a matter of law and thus, I think that that 1985 finding of Mr. Hunt as, to be a predicate felony, should not be used in this court.

MR. SMITH: If I might respond?

THE COURT: The appellate court says defendant's next conviction concerning the validity of sentence as a second felon, although defendant did not raise this issue prior to sentence, it appears he was improperly sentenced as a predicate felon. Predicate felony sodomy first degree, alleged to have been committed in 1958. That is an entirely different indictment than this one charging kidnaping, isn't it? This plea was entered or he was arraigned on this one on the 27th of March, 1986. The plea of guilty was October 15, 1987. The sentence in the State of Louisiana

predated that; didn't it?

MR. CONNOLLY: You have the document before you, your Honor. I can't say--

THE COURT: Well, he was sentenced in the county of Albany in September, 1985. He was sentenced as a second felony offender. They are claiming that he had been previously sentenced on May of 19--, in May of 1987, to a term of life in the State of Louisiana. That would make that felony conviction previous to his conviction here and, of course, at the original sentence it was the Albany County felony which was made reference to, but Mr. Smith now charges him with being a second felony offender based upon the Louisiana plea, conviction, and sentence. I think Mr. Smith has demonstrated through documentary evidence that he is, in fact, a predicate felon, do you not?

MR. CONNOLLY: No. I can not agree with that, your Honor, for the reasons - -

THE COURT: You claim there was no conviction in the State of Louisiana?

MR. CONNOLLY: Conviction alone is not sufficient to make him a predicate felon.

THE COURT: Why do you say that?

MR. CONNOLLY: There are numerous

cases in which a defendant has been subjected to conviction out of state or by the federal courts for a felony in which that felony is sought, the People have sought to use that felony conviction as a predicate felony in New York.

THE COURT: Oh, I am familiar with those and I agree, if the acts complained of in the foreign state would not have amounted to a felony in th state then you would be on very good ground, but I thin that every state in the union, as well as the federal courts would say that a sentence, for kidnaping, to lif amounts to a previous felony, wouldn't you?

MR. CONNOLLY: No, your Honor.

THE COURT: You wouldn't?

MR. CONNOLLY: No.

THE COURT: We are not taking about custodial interference here. We are talking about kidnaping; which is a felony all over the United States

MR. CONNOLLY: Your Honor, there is no evidence before the Court pertaining to what conduct the defendant admitted to in the State of Louisiana.

THE COURT: The evidence before the court is that the judgment in the United States District Court for the Western District of Louisiana, that he

willfully and knowingly did transport in interstate commerce a person who had theretofore been unlawfully seized, confined, inveigled, decoyed, kidnaped, carried away and held for ransom, reward, or otherwise, and the sentence alone would make it a felony.

MR. CONNOLLY: The sentence alone is not determinative.

THE COURT: What is the difference between a felony and a misdeamenor in the State of New York.

MR. CONNOLLY: In the State of New York, I believe, it is the length of the term of the prison that can be imposed.

THE COURT: That is right, and what is our determination whether a foreign judgment is a felony based upon, in the State of New York, would that have been a felony in the State of New York? Anyone being sentenced to that kind of sentence in the State of New York would be considered a felon, would they not?

MR. CONNOLLY: Yes, if sentence had been imposed by the State of New York pursuant to the laws of the State of New York. Are you saying, your Honor, that if the State of Massachussetts imposed a period of incarceration of two years as punishment for

the crime of speeding, that the crime of speeding would be a felony in the State of New York.

THE COURT: The punishment of two years would be prima facie evidence of a felony, but of course, you could go behind the facts in that particular case and determine that the factual issue would not have resulted in a felony in the State of New York; but the point I am trying to make is whether you are in Louisiana, Massachusetts, or New York, kidnaping is always considered a felony.

MR. CONNOLLY: Your Honor, for the reasons--

THE COURT: We can't go behind the plea of guilty which resulted in a felony of the plea of guilty of, to kidnaping to determine whether or not factually it was a kidnaping. That would be trying the Louisiana case all over again since that is what he pleaded to and that is what he was sentenced for in both convictions. It amounts to a felony. Your motion is denied with an exception.

MR. CONNOLLY: Your Honor, if I could, I am not arguing with you, but I would like to ensure that on appeal that defendant could have benefit of incorporation into the record of the motion that I

made including the papers that I submitted to the court.

THE COURT: Well, certainly.

MR. SMITH: Your Honor, the previous sentence on each of the pleas was as follows: upon the two counts of Kidnaping in the Second Degree the agreed to term of incarceration was twelve and one half to twenty-five years. On each of the six counts of sodomy in the first degree there was a term of incarceration imposed on each count of twelve and one half to twenty-five years. On the three counts of sodomy in the second degree there was a term of incarceration imposed on each count of three and a half to seven years. On the four cunts of the Use of a Child in a Sexual Performance, a term of incarceration was imposed on each count of seven and one-half to fifteen years and on the three counts of promoting a Sexual Performance by a child, a term of incarceration was imposed of three and one-half to seven years. All sentences to run concurrent with and as to each other, and I would move that the plea bargain agreement previously entered into by the parties be followed by the court and that sentence be pronounced after Mr. Hunt and his attorney have been given the opportunity to make any statements that they wish to make.

THE COURT: Wayne Robert Hunt, do you have legal cause why you should not be re-sentenced at this time?

MR. HUNT: Yes, I do, your Honor.

THE COURT: You want to state it?

THE DEFENDANT: Okay. At the beginning of this month I filed my own motion pro se, and that hasn't been opposed yet by the District Attorney. I have no opposition yet and I do object to being sentenced to erroneous charges.

THE COURT: Are you discharging your lawyer?

THE DEFENDANT: No, I am not discharging my lawyer.

THE COURT: Well, I can't make any decision in a case where there are two counsel. Either he is your lawyer or you are your lawyer pro se. Did you make your lawyer aware of your pro se motion?

MR. CONNOLLY: He did, your Honor. I am aware of it.

THE COURT: Are you in a position to argue his motion for him?

MR. CONNOLLY: No, I am not, your Honor.

MR. SMITH: The reason he is not, your Honor, I would question, is that, the arguments raised in the motion were either the kind of arguments that could have been raised on the direct appeal or were, in fact, raised upon the direct appeal and decided adversely to Mr. Hunt on the appeal by the Third Department.

THE DEFENDANT: They couldn't be raised on direct appeal because everything I have read in the law library said that when I claimed fraud against the court and defendant, it has to go to the original Court.

THE COURT: People complicate things for themselves by making pro se motions when they have got lawyers. I assume when you make a pro se motion when you have competent counsel, which you do, that he will address that motion at the time that he is arguing his motion against you being resentenced as a predicate felony offender, and of course, I am not going to go through with this sentencing until that is done, and since you are counsel for the defendant, Mr. Connolly, please proceed? Do you want time to confer with your client in order to make that particular argument?

MR. CONNOLLY: Yes, your Honor, I

think it is in my client's best interest that I have some time.

THE COURT: We will defer this procedure to the end of the calendar today.

(Whereupon, matter in recess.)

THE COURT: We are back to people versus Wayne Hunt. Mr. Smith.

MR. SMITH: I would imagine Mr. Hunt is back in the holding room.

THE COURT: People versus Wayne Robert Hunt. Mr. Connolly, have you had the opportunity to discuss and review these matters with your client; especially his pro se motion?

MR. CONNOLLY: Yes, I have, your Honor. I would like to adopt that pro se motion as my own to be made on behalf of the defendant.

THE COURT: Good. All right.

MR. CONNOLLY: And your Honor has a copy of the motion, I presume?

THE COURT: Yes.

MR. CONNOLLY: The relief defendant seeks in this motion is to withdraw his guilty plea and dismiss the indictment, and the ground or basis for the relief defendant seeks is the following: Approximately

two days before the defendant entered a plea of guilty in this case his attorney, Lawrence Conners, was provided with a copy of an FBI lab report which was--which had been prepared at the behest of the District Attorney and it was given to him by the District Attorney. The lab report concerned photographs which had been submitted to the Grand Jury in this proceeding which returned an indictment against Mr. Hunt. The photographs allegedly depicted Mr. Hunt engaged in various criminal acts with the alleged victims in the case. Because the report was received so near the date on which the plea of guilty was entered, neither Mr. Hunt nor his attorney had any substantial opportunity to review the report. However, subsequently and while in prison Mr. Hunt did review the report and it then came to his attention that the report specified the date on which the film from which the pictures had been produced was manufactured. The dates of manufacture specified in the report, in many cases for the various photographs referred to in the report, postdated the dates alleged in the indictment for the commission of the crimes. That is, in essence, then the film which allegedly depicted Mr. Hunt committing various crimes was, in fact, not manufactured until after the date on which those crimes were allegedly committed and

that, of course, is a logical impossibility. Thus, it would appear that the District Attorney, before the defendant entered a plea of guilty, was in possession of evidence which indicated that evidence presented to the Grand Jury was false and it would appear, also, inasmuch as this was a lab report prepared at the behest of the District Attorney, that the District Attorney had knowledge of that falsity and having knowledge of that falsity, it was incumbent upon the District Attorney to advise defendant before he entered his plea of guilty, of the falsity of testimony before the Grand Jury. This, as I say, did not come to defendant's attention until after he entered the plea of guilty. Now, I would refer your Honor to the Court of Appeals decision in People versus Pelchat.

THE COURT: Are you, at this time making a 440 motion?

MR. CONNOLLY: Well, it might be considered that, your Honor, but I—

THE COURT: Because that is the only way in which the Court could hear any question involving evidence because when somebody pleads guilty to one or more counts in the indictment, they waive any irregularities such as a misspelled word or improper dat

or something of that nature.

MR. CONNOLLY: This is not an irregularity of the indictment. It is a question of the legal sufficiency.

THE COURT: It is an irregularity if a date is improper, if in fact the act took place within the statutory period when we are taking about statute of limitations. The only way in which this could be raised would be on a question of a 440 motion upon the grounds of newly discovered evidence.

MR. CONNOLLY: Well, I understand what you are saying.

THE COURT: Or upon a question of fraud and mistake or mutual mistake or something of that nature. For facts not known to the Court at the time. Facts, not law.

MR. CONNOLLY: I understand. Would you consider hearing this as an article 440 motion after the defendant is sentenced?

THE COURT: Yes, because the motion doesn't lie until after he is sentenced.

MR. CONNOLLY: Would you consider hearing it today, your Honor?

THE COURT: Well, you want to have,

you just want to make argument today? Because a 440 motion, which can't be resolved on the face of the papers, has to have a hearing.

MR. CONNOLLY: A hearing would be required.

THE COURT: Of course the prosecution isn't prepared to go forward with a hearing.

MR. CONNOLLY: Nor am I--I would not want to have a hearing today, but I would like the court to hear argument with respect to the issues which would exist at the hearing.

THE COURT: Yes, we have several different issues here. The first one is with reference to the resentencing as a second or as a predicate felony offender. I think Mr. Smith has met that with documentary proof. The pro se motion made by your client is one which should have been addressed to the Court under 440 under the original sentencing; however, that has been set aside by the Appellate Court and until this sentence is passed, 440 doesn't lie. It will immediately afterward, but you would have to bring that on in appropriate fashion.

MR. CONNOLLY: Your Honor, all I am asking is whether you would consider the fashion in which

this has been brought on sufficiently appropriate so that arguments could be heard on it today.

THE COURT: The allegation made by defendant would form the basis for a 440 motion at the proper time. Right now, it is premature. He has not been sentenced.

MR. CONNOLLY: Okay. Thank you.

THE COURT: So, I would then again ask Mr. Robert Wayne Hunt if he has further legal cause why he should not be sentenced. He has made reference to his pro se motion. I have to deny that motion at this time, because the remedy that he seeks I cannot give him until he brings a 440 motion.

MR. CONNOLLY: Umm hmm.

THE COURT: After sentencing. Do you, Mr. Connolly, have legal cause why your client should not be sentenced at this time?

MR. CONNOLLY: No, your Honor.

THE COURT: Mr. Smith, do you have a further statement before sentence?

MR. SMITH: Simply to reaffirm that this is a negotiated settlement, your Honor. The defendant plead knowingly to the crimes of which he was convicted with full knowledge that he would receive a

total package sentence of twelve and a half to twenty-five years as a predicate felon and I see no good cause why the negotiated and agreed to sentence should not be imposed now. Your Honor - -

THE COURT: Are you relying exclusively on this United States District Court conviction?

MR. SMITH: That is the predicate conviction we are alleging in out 400.21 statement, your Honor, and if you will look at the statute--

THE COURT: Which I am about to do.

MR. SMITH: Since he has served, was sentenced to a period of ten years on that, the time is tolled and it is a proper predicate felony conviction.

THE COURT: I was only concerned wit the ten year period.

MR. SMITH: Yes, sir.

THE COURT: All right, and that is the second felony allegation you are making.

MR. SMITH: Yes, sir, as set forth i our statement previously filed.

THE COURT: All right. Now, Mr. Connolly, do you have a statement to make on behalf of your client before sentencing, other than your legal

argument?

MR. CONNOLLY: No, I don't, your Honor.

THE COURT: Mr. Wayne Hunt, you don't have to say a word if you don't want to, but you have an absolute legal right to say anything you want to say. Is there anything you wanted to say.

THE DEFENDANT: No. I have already said what I want. Thank you, your Honor.

THE COURT: Wayne Hunt, based upon your plea of guilty to kidnaping second degree in each of two counts it is the sentence of this court you be sentenced to an indeterminate term of imprisonment which shall have a maxumum term term of twenty-five years and this Court hereby imposes a minimum period of imprisonment pursuant to statute upon the allegation that you are a second felony offender of twelve one one half years and directs that you be committed to the custody of the New York State Department of Correctional Facilities and be delivered to the Downstate Correctional Facility there to be dealt with in accordance with law or to such facility as you have come to this Court from at this time, but I think that since his sentence required resentencing he may have to go through the Downstate

Correctional Facility for the purposes of classification. In reference to your pleas of guilty to six counts of Sodomy in the Second or three counts or six counts of Sodomy in the First Degree, it is the sentence and judgment of this court that you be sentenced to a sentence of imprisonment which shall have a maximum term of twenty-five years and the court hereby imposes a minimum period of imprisonment pursuant to statute of twelve and one-half years. In reference to your pleas of guilty to sodomy in the second degree in three counts it is the sentence and judgment of this Court that you be confined to under a sentence of imprisonment which shall have a maximum term of seven years and a minimum term pursuant to statute of three and one-half years and in reference to the Promoting of Sexual Performance by a Child in three counts and to the Use of a Child in a Sexual Performance in four counts and we are looking at what section there?

MR. SMITH: Your Honor, on the four counts of Use of a Child in a Sexual Performance in violation of Section 263.05 of the Penal Law of the State of New York, which is a class C felony, the Court imposed concurrent sentences of seven and one-half to 15 years.

THE COURT: Well, then the sentence

would likewise be the same, a concurrent, a sentence of indeterminate sentence of 15 years as the maximum term and seven and one-half years as the minimum pursuant to statute, which means in the aggregate we have Kidnaping in two counts, Sodomy First in one count. That is Kidnaping Second. Sodomy Second in three counts? Promoting Sexual Performance by a Child three counts and Use of a Child in a Sexual Performance in four counts. Sentences of twelve and one-half to twenty-five, twelve and one half to twenty-five, three and one-half to seven, and seven and one half to 15; all sentences to run concurrently each with the other.

MR. SMITH: Your Honor, I am sorry, Promoting Sexual Performance by a Child as a class D felony and the term previously imposed upon those three counts was three and one-half to seven years, concurrent.

THE COURT: That is what, I have reversed these, then we have three and one-half to seven on the Use of a Child in a Sexual Performance. Promoting Sexual Performance?

MR. SMITH: Yes sir.

THE COURT: That is what I said. That was on the record. Three counts, Use of child in a Sexual Performance, higher grade, that is seven and one

half to 15?

MR. SMITH: Thank you, your Honor.

THE COURT: I think the record will bear that out, because I had these noted from last time. In any event, please, Mr. Connolly, advise your client of his right to appeal.

MR. CONNOLLY: Your Honor, if the record may reflect that I will now hand Mr. Hunt notice of his right to appeal and ask him to sign it.

THE COURT: You have thirty days in which to appeal Mr. Hunt. If you can't afford a lawyer, one will be provided for you. If you fail to move withir thirty days you loose that right forever. You also have, as I pointed out on the record before, the right, now, tc bring the 440 motion if you think you have grounds to do so.

MR. CONNOLLY: May the record reflect I am handing a copy of the notice of defendant's right tc appeal to the—

THE COURT: Thank you very much. Thank you. Mr. Connolly, are you assigned?

MR. CONNOLLY: I am assigned counsel, your Honor.

THE COURT: At the appellate level or

trial level.

MR. CONNOLLY: Appellate level.

THE COURT: In the event that Mr. Hunt needs assigned counsel to prosecute his 440 motion I would assign you in the event that he requires a lawyer.

MR. CONNOLLY: Thank you, your Honor. Can I have a word with my client.

MR. CONNOLLY: Your Honor, Mr. Hunt would like me to represent him on his article 440 motion, but after giving the matter some thought, he thinks it would be better not to proceed with that motion today.

THE COURT: You want to go forward with your appeal. I mean, does he.

MR. CONNOLLY: What I would like to do first is make an article 440 motion.

THE COURT: Well, do you want to do that for him?

MR. CONNOLLY: Yes, your Honor.

THE COURT: Then you are assigned for that purpose. Not only for making a motion, but dealing with him and getting it on the record and getting it argued. That is the type motion under these circumstances in which there might have to be a hearing rather than just argument on the papers, because he is

alleging certain questions of fact here.

MR. CONNOLLY: I understand, your Honor.

THE COURT: Okay.

MR. CONNOLLY: What I was trying to say, your Honor, is that I--

THE COURT: Which would require his presence here with witnesses.

MR. CONNOLLY: That is right.

THE COURT: All right? You have any further problems on that?

MR. CONNOLLY: I just wanted to say that I don't want to proceed with that immediately.

THE COURT: No, you have to take time and go over it with him and be prepared. It will have to be on notice anyway for the District Attorney's office so they can be properly prepared.

MR. SMITH: Your Honor, just to clarify the record, I would like to repeat my understanding of the sentences imposed. Upon the two counts of Kidnaping in the Second Degree, terms of incarceration imposed on each count of twelve and one half to twenty-five years. On the six counts of sodomy in the first degree, sentences of incarceration imposed

of twelve and one half to twenty-five years on each. On the three counts of Sodomy in the Second Degree; incarceration imposed on each count of three and one-half to seven years. On the four counts of Use of a Child in a Sexual Performance, terms of incarceration imposed of seven and one-half to 15 years on each and on the three counts of promoting a Sexual Performance by a Child, terms of incarceration imposed on each count of three and one-half to seven years, all sentences to run concurrent with any as to each other.

THE COURT: Yes. That is the sentence, and I think the record will show that that is the sentence.

MR. CONNOLLY: Yes, that is my understanding also.

(Whereupon, matter concluded.)

SPECIAL INFORMATION CHARGING PREDICATE OFFENSE

STATE OF NEW YORK
COUNTY COURT

Office of County Clerk
Nov 25 4 24 AM '85
Albany, N.Y.

File No. SU850825
COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

- against -

WAYNE R. HUNT,
Defendant.

SPECIAL INFORMATION
CHARGING PREDICATE
OFFENSE
Index No. DAQ290-85

THE DISTRICT ATTORNEY OF THE COUNTY OF ALBANY charges that the above named defendant, Wayne R. Hunt, was previously convicted of the crime of Kidnapping in violation of 18 United States Code, Section 1201, in the United States District Court of the Western District of Louisianna, on the 14th day of February, 1977.

Upon this conviction, the defendant was sentenced on February 14, 1977, to the custody of the Attorney General for imprisonment for a period of life, the maximum fixed by statute, and for a study as described in 18 USC 4205(d), the results of such study to be furnished this Court within three months, unless the Court grants further time not to exceed three months, whereupon the defendant shall be returned to this Court and the sentence of imprisonment herein imposed shall be subject to modification in accordance with 18 USC 4205(c). It was directed that the U.S. Marshal deliver the defendant to the custody of the U.S. Medical Center at Springfield, Missouri, INSTANTER, and

FURTHER, on the 16th day of May, 1977, the defendant having been convicted upon his plea of guilty of the offense of 18 USC 1201 and having on February 14, 1977, been committed to the custody

OFFICE OF ALBANY COUNTY CLERK ALBANY, N.Y. Nov 26 10 27 AM '85

SPECIAL INFORMATION CHARGING PREDICATE OFFENSE

the Attorney General pursuant to 18 USC 4205(c), for imprisonment for a term of life (the maximum period) and for a study as described in 18 USC 4205(d), and the defendant having been returned to the Court; and the Court having received and considered the report of such study, it was

ORDERED AND ADJUDGED that the period of imprisonment theretofore imposed be reduced to ten (10) years, with the special condition and recommendation that he be afforded or incarcerated in an institution in which psychiatric and medical care were available.

SOL GREENBERG
ALBANY COUNTY DISTRICT ATTORNEY

Lawrence P. Wiest

STATE OF NEW YORK
COUNTY OF ALBANY CLERK'S OFFICE } ss.:

I, THOMAS G. CLINGAN, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy Special Information with the original thereof filed in this office on the 26 day of Nov 19 85 and that the same is a correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal, this 29 day of Aug 19 89

Thomas G. Clingan Clerk

CERTIFICATE OF CONVICTION #27-1149

CERTIFICATE OF CONVICTION
C.P.L. 60.60(1)

STATE OF NEW YORK : COUNTY OF ALBANY

COUNTY COURT CITY OF ALBANY

The People of the State of New York
against
WAYNE HUNT
Defendant

Certificate Of Conviction
INDICTMENT #27-1149

This is to certify that a Judgement of Conviction has been entered in this court, before the Hon. JOSEPH HARRIS, a Judge-Justice of this Court, on the 28th day of OCTOBER, 19 85, convicting the above named defendant of the offense of Grand Larceny 3rd; 155.30(1) E Felony

and sentence was imposed as follows,

November 25, 1985- Ind. 4 years max., 2 years min. as a second felony offender to Fishkill, NY $75.00 mandatory surcharge to be taken from inmates fund, sentence to run concurrent to outstanding time.

Dated at:

ALBANY, N.Y.

this 29th day of AUGUST, 19 89

Thomas G. Clingan
Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
OPELOUSAS DIVISION

UNITED STATES OF AMERICA	*	
VS.	*	CRIMINAL NO. CR 76-738
WAYNE ROBERT HUNT	*	18 U.S.C. 1201

I N D I C T M E N T
(Superseding)

THE GRAND JURY CHARGES:

COUNT I

That on or about August 4, 1976, in the Opelousas Division of the Western District of Louisiana, WAYNE ROBERT HUNT willfully and knowingly did transport in interstate commerce from Lewisburg, Louisiana, to the State of Georgia, Keith James Thibodeaux, who had theretofore been unlawfully seized, confined, inveigled, decoyed, kidnapped, carried away and held by the said WAYNE ROBERT HUNT for ransom, reward and otherwise, all in violation of Title 18, United States Code, Section 1201. (18 U.S.C. 1201)

A TRUE BILL:

FOREMAN

DONALD E. WALTER
United States Attorney

PAUL LYNCH
Assistant United States Attorney

ATTEST A TRUE COPY
DATE ... 19..
... CLERK
Deputy Clerk, U.S. District Court
Western District of Louisiana

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
OPELOUSAS DIVISION

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
FEB 14 1977
ROBERT H. SHEMWELL, CLERK
By ... Deputy

UNITED STATES OF AMERICA	:	
VS.	:	CRIMINAL NO. 76-738
WAYNE ROBERT HUNT	:	

PLEA BARGAIN

In consideration of the Defendant, WAYNE ROBERT HUNT, entering a Guilty Plea to the one-count Indictment in this case, a basis in fact being found by the Court pursuant to Rule 11, Federal Rules of Criminal Procedure, to accept same, the United States Attorney's Office agrees to not comment on or make a recommendation as to the sentence to be imposed.

This is the entire Plea Bargain between WAYNE ROBERT HUNT and the United States Attorney's Office, Western District of Louisiana, in this case, and is made knowingly, freely and voluntarily without any threats from anyone, after due consultation with his undersigned counsel.

DONALD E. WALTER
United States Attorney

By: ...
PAUL LYNCH
Assistant United States Attorney

ATTEST A TRUE COPY
DATE ... 19..
... CLERK
Deputy Clerk, U.S. District Court
Western District of Louisiana

JAMES DOWNS
Attorney for Defendant
WAYNE ROBERT HUNT

WAYNE ROBERT HUNT
Defendant

Signed this 14th day of February, 1977.

AFFIDAVIT OF UNDERSTANDI... OF MAXIMUM PENALTY AND CONSTITUTIONAL RIGHTS

...NITED STATES DISTRICT CO...T
WESTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

v.

WAYNE ROBERT HUNT

Alexandria Division

CR.76-738

AFFIDAVIT OF UNDERSTANDING OF MAXIMUM PENALTY AND CONSTITUTIONAL RIGHTS

I, Wayne Robert Hunt, the above named defendant, having been first duly sworn and placed under oath by the Clerk or his Deputy of the United States District Court, state that I have been advised and personally addressed by the Court (Judge) as to the nature of the charge against me and having been furnished a copy of the charge hereby state that I understand the charge and that the Court has addressed me personally as to the maximum possible penalty that may be imposed against me as follows:

By imprisonment for any term of years or for life

I further state that I understand and the Court has addressed me personally at the arraignment proceeding as to:

1. My right to be represented by counsel (a lawyer) of my choice, or if I cannot afford counsel, my right to be represented by Court-appointed counsel at no cost to me.

2. My right to have the charge against me presented to a Grand Jury for indictment.

3. My right to have a jury trial with twelve jurors who must all agree as to my guilt in order to convict.

4. My right not to be required to testify against myself, or at all, if I do not so desire.

5. My right to confront and cross-examine witnesses against me and my right to have compulsory process to require witnesses to testify.

6. My right to plead guilty or not guilty.

I realize that by pleading guilty I stand convicted of the crime charged and waive my privilege against self-incrimination, my right to jury trial, my right to confront and cross-examine witnesses, and my right of compulsory process.

I further state that my plea in this matter is free and voluntary and that it has been made without any threats or inducements whatsoever from anyone associated with the State or United States Government and that the only reason I am pleading guilty is that I am in fact guilty as charged. The Court has given me the opportunity to make any statement I desired.

Sworn to and subscribed before me this 14th day of February, 19 77, in Open Court in Alexandria, Louisiana.

ATTEST A TRUE COPY
this 14 day of Feb 19 77
R. H. CALDWELL, CLERK
By Deputy Clerk, U.S. District Court
Western District of Louisiana

WITNESS:
Deputy Clerk, U.S. District Court
Western District of Louisiana

Wayne R. Hunt
Defendant

Attorney

Deputy Clerk of Court

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
FEB 14 1977
ROBERT H. CALDWELL, CLERK
By Deputy

JUDGMENT AND PROBATION/COMMITMENT ORDER, FILED MAY 16, 1977

United States of America vs. — United States District Court for

DEFENDANT: WAYNE ROBERT HUNT

Western District of Louisiana
OPELOUSAS DIVISION

DOCKET NO. CR-76-738

JUDGMENT AND PROBATION/COMMITMENT ORDER AO 245 Rev.

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH 2, DAY 14, YEAR 77

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant (formulation waived) assistance of counsel.

☒ WITH COUNSEL JAMES DOHM
(Name of counsel)

PLEA

☒ GUILTY, and the court being satisfied that there is a factual basis for the plea. ☐ NOLO CONTENDERE ☐ NOT GUILTY

FINDING & JUDGMENT

There having been a finding/verdict of ☐ NOT GUILTY. Defendant is discharged ☒ GUILTY. on the single Count

Defendant has been convicted as charged of the offense(s) of 18 USC 1201 - Deft. willfully and knowingly did transport in interstate commerce a person who had theretofore been unlawfully seized, confined, kidnapped, decoyed, kidnapped, carried away and held for ransom, reward and otherwise,

SENTENCE OR PROBATION ORDER

AND ON THE 14TH DAY OF FEBRUARY, 1977, [sentence should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of life, the maximum fixed by statute, and for a study as described in 18 USC 4205(d), the results of such study to be furnished this Court within three months, unless the Court grants further time not to exceed three months, whereupon the defendant shall be returned to this Court and the sentence of imprisonment herein imposed shall be subject to modification in accordance with 18 USC 4205(c). It is hereby directed that the U. S. Marshal deliver the Defendant to the custody of the U. S. Medical Center at Springfield, Missouri FORTHWITH.

AND ON THIS THE 16TH DAY OF MAY, 1977:

SPECIAL CONDITIONS OF PROBATION

The defendant having been convicted upon his plea of guilty of the offense of 18 USC 1201 and having on February 14, 1977 been committed to the custody of the Attorney General pursuant to 18 USC 4205(c), for imprisonment for a term of life (the maximum period) and for a study as described in 18 USC 4205(d), and the defendant having been returned to this Court; And the Court having now received and considered the report of such study, IT IS ORDERED AND ADJUDGED that the period of imprisonment heretofore imposed be reduced to 10 years, with the special condition and recommendation that he be afforded or incorporated in an institution in which psychiatric and medical care is available.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General or his authorized representative.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on ... to ... at ..., the institution designated by the Attorney General or his authorized representative for the within Judgment and Commitment.

Defendant noted on appeal on ...

Defendant released on ...

Mandate issued on ...

Defendant's appeal determined on ...

Defendant delivered on ... to ... at ..., the institution designated by the Attorney General or his authorized representative for the within Judgment and Commitment.

ATTEST: A TRUE COPY
this 16 day of May 19 77
R. H. CALDWELL, CLERK
By Deputy Clerk, U.S. District Court
Western District of Louisiana

U.S. MARSHAL

By ...

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
MAY 16 1977
ROBERT H. CALDWELL, CLERK
By Deputy

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON
this date 5-16-77
R. H. CALDWELL, CLERK
By Deputy

MARK E. SCOTT

Date 5-16-77

JUDGMENT AND PROBATION/COMMITMENT ORDER, FILED MAY 16, 1977

Dave Pardue - cc'd: Mr. Jaehnich & Committed
to delivery Warden Shelby & Clerk to Federal Correctional Institute Texas for Parole Purposes. No. 9MC & P. Hearing Date
of this Date 6/1/77.

Kenneth B. Vegale
U.S.A.

Pamela Tarlton
Dep. Clk.

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
MAY 16 1977
ROBERT H. SHEMWELL, CLERK
BY _____
DEPUTY

GENERAL CONDITIONS OF PROBATION

While probation has been granted the defendant shall, during the period of probation, conduct himself as a law-abiding, responsible citizen and observe all conditions of probation prescribed by the court. TO THE DEFENDANT – You shall:
(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law enforcement officer;
(2) associate only with law-abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. When out of work notify your probation officer at once, and consult him prior to job changes;
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any change in your place of residence;
(6) follow the probation officer's instructions and report as directed.
The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

JAILTIME: 09-11-76 to Present

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on May 16, 1977 to ALEXANDRIA CITY JAIL

Defendant noted appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on June 16, 1977 to Medical Center for Federal Prisoners at Springfield, MO, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

ATTEST: A TRUE COPY
this 16th day of June, 1977
ROBERT H. SHEMWELL, CLERK
By Deputy Clerk, U.S. District Court
Western District of Louisiana

John I Pierient
United States Marshal
By Clark L. McLeod
Deputy Marshal

GUARD

JAMES B. CANFIELD
DISTRICT ATTORNEY

OFFICE OF THE
DISTRICT ATTORNEY
RENSSELAER COUNTY
COURT HOUSE, TROY, NY 12180
518-270-4040
FAX 518-270-4025

October 11, 1991

Mr. William K. Suter, Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Wayne Hunt vs. The People of the State of New York
No. 91-5952

Dear Sir:

Enclosed herewith please find 40 copies of Respondent's Brief In Opposition To Petition For Writ Of Certiorari To The New York State Court Of Appeals.

Very truly yours,

James B Canfield

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SUPREME COURT OF THE UNITED STATES

WAYNE HUNT *v.* NEW YORK

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 91–5952. Decided November 12, 1991

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

A key question in this case is whether the Double Jeopardy Clause applies to trial-like sentence enhancement proceedings in non-capital cases. In *Bullington* v. *Missouri*, 451 U. S. 430 (1981), this Court held that the Clause was implicated in such proceedings in the capital context. We expressly declined to address the applicability of the Clause to non-capital sentence enhancement proceedings in *Lockhart* v. *Nelson*, 488 U. S. 33, 37 n. 6 (1988). The New York Court of Appeals in this case held that Double Jeopardy Clause principles did not preclude the State from seeking a second sentence enhancement after it failed to establish the requisite statutory predicate for enhancement in the first proceeding. *State* v. *Hunt*, 78 N. Y. 2d 932, 933, ___ N. E. 2d ___, ___ (1991).

Other courts take the contrary view. See, *e. g.*, *Durosko* v. *Lewis*, 882 F. 2d 357, 359 (CA9 1989), cert. denied, 110 S. Ct. 1930 (1990) and *Bullard* v. *Estelle*, 665 F. 2d 1347, 1361 (CA5 1982), vacated and remanded on other grounds, 459 U. S. 1139 (1983), both cases holding that Double Jeopardy analysis applies in sentence enhancement proceedings.

Because this division in authority should be resolved, I believe the Court should grant certiorari.